

## LEGAL CAUSE

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NEGLIGENCE is not a ground of liability unless it causes injury or damage to some interest which the law recognizes and protects. Moreover, it does not make a defendant liable for any injury or damage that is not a consequence of the negligence. The establishment of the requisite causal connection is therefore an element of a plaintiff's cause of action for negligence, to be pleaded and proven by him. And where a cause of action exists, the question of causal connection will determine the scope of liability—the extent of the injury or damage for which defendant will have to pay. The question then naturally arises what is the kind of causal connection or relationship that the law requires to be proven. Obviously the legal test includes a requirement that the wrongful conduct must be a *cause in fact* of the harm; but if this stood alone the scope of liability would be vast indeed, for “the causes of causes [are] infinite”—“the fatal trespass done by Eve was cause of all our woe.” But the law has not stopped there—it has developed further restrictions and limitations. The concept this development has produced is generally called “proximate” or “legal” cause. To be sure this concept is only one of the devices used to limit the fact and the extent of liability for negligence.<sup>1</sup> In the progress of negligence law, however, the concept of proximate cause has been greatly overworked to limit or control both the liability of defendant and the effect of contributory negligence because of many considerations which can be treated in a more meaningful and significant way in connection with other issues, such as that of duty, standard of conduct and the like.<sup>2</sup> “Having no integrated meaning of its own, [the] chameleon quality [of proximate cause] permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the

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1. Limitations on the scope of duty and the rule of contributory negligence are, for example, other such devices.

2. See GREEN, *RATIONALE OF PROXIMATE CAUSE* 78, 122 *et seq.* (1927); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 246-55 (1932); and Maltbie, C. J., in *Kinderavitch v. Palmer*, 127 Conn. 85, 89 *et seq.*, 15 A.2d 83, 86 (1940).

work of Aladdin's lamp."<sup>3</sup> The result has been a widely recognized confusion, and as luxuriant a crop of legal literature as is to be had in any branch of tort law.<sup>4</sup> Perhaps recent years have seen a little headway made in dispelling the confusion and taking some of the work load off of this weary concept by separating other strands for analysis and treatment under other more appropriate headings. If that is so much of the credit belongs to Dean Green.

#### CAUSAL RELATION OR CAUSE IN FACT.

Through all the diverse theories of proximate cause runs a common thread; all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability. This notion is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence or non-existence of a causal relation as laymen would view it. Clearly this is not a quest for a *sole* cause. Probably it cannot be said of any event that it has a single causal antecedent; usually there are many. For the purpose of the present inquiry it is enough that defendant's negligence be a cause in fact of the harm.

A rough working test of this relation, valid for most cases and enjoying wide currency, is the "but for" or *sine qua non* test: defendant's negligence is a cause in fact of an injury where the injury would not have occurred *but for*

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3. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-2 (1950).

4. The following is a suggestive but not exhaustive list of the literature: GREEN, *RAISONALE OF PROXIMATE CAUSE* (1927); Bohlen, *The Probable or the Natural Consequences as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 148 (1901); Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COL. L. REV. 16, 136 (1909); Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911); Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10 (1914); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Pollock, *Liability for Consequences*, 38 L. Q. REV. 165 (1922); Levitt, *Cause, Legal Cause and Proximate Cause*, 21 MICH. L. REV. 34, 160 (1922); Reese, *Negligence and Proximate Cause*, 7 CORN. L. Q. 95 (1922); Green, *Are Negligence and "Proximate" Cause Determined by the Same Test*, 1 TEX. L. REV. 242, 256 (1923); Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211, 343 (1924); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Burke, *Rules of Legal Cause in Negligence Cases*, 15 CALIF. L. REV. 1 (1926); Green, *Are There Dependable Rules of Causation*, 77 U. OF PA. L. REV. 601 (1929); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932); Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934); Carpenter, *Concurrent Causation*, 83 U. OF PA. L. REV. 941 (1935); Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936); Campbell, *Duty, Fault and Legal Cause* [1938] WIS. L. REV. 402; Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization*, 6 U. OF CHI. L. REV. 36 (1938); Morris, *On the Teaching of Legal Cause*, 39 COL. L. REV. 1087 (1939); Carpenter, *Proximate Cause*, 14 SO. CALIF. L. REV. 1, 115 (1940); 15 SO. CALIF. L. REV. 187, 304, 427 (1941); 16 SO. CALIF. L. REV. 1, 61, 275 (1942); Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185 (1950); Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 621, 755 (1950).

defendant's negligent conduct.<sup>5</sup> It is probably safe to say that wherever this test is met, the cause in fact relation<sup>6</sup> does exist. But the test is not universally valid as a test of exclusion of causes in fact. There is one situation where it will not work. If two independent causes concur to produce a result which either of them alone would have produced, each is a cause in fact of that result though it would have happened without *either* case (but not if *both* causes were absent).<sup>7</sup> Thus if two fires from separate sources combine as they reach plaintiff's property, and consume it, each is a cause though it be assumed (or shown) that the property would have been consumed as completely by either fire alone.

So far as the *substantive* law of torts goes, the cause in fact aspect of the requirement of legal cause gives little trouble, and it has been called a simple one.<sup>8</sup> Yet there are problems here which often beset the trial court and practitioner and prove fatal to many a case. The most serious of these problems is that of sufficiency of proof where the ascertainable facts are meager, or where they present complicated questions of science, medicine, engineering, or the like. Another—usually less serious—problem is in finding appropriate language for the charge.

The problem of proof here is essentially like that presented by the problem of proving negligence circumstantially, and the two often overlap. Thus in *res ipsa loquitur* cases the requirement of defendant's exclusive control of the injuring agency really calls for nothing more than proof tending to eliminate other possible causes of the occurrence, so as to indicate that the negligence of which that occurrence speaks is probably that of defendant.<sup>9</sup> But where negligence is pinned on the defendant by direct or other sufficient proof there may still remain a serious problem of proving the causal relation. This is not always so—perhaps in the bulk of accident cases the real issues turn

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5. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 235-6, 396-7 (1932); Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 108-10 (1911).

6. But not necessarily the relationship of legal or proximate cause. It has been said that the "but-for" test is valid as a test of exclusion (but not of inclusion) for *proximate* cause (except in the case of the concurring efficient causes given in the text). Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911). A moment's reflection will reveal that this statement and the one in the text (which is concerned with cause *in fact* only) are not at all inconsistent. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396 (1932), remarks, obliquely, that the "but for" rule may be used as a test for *exclusion* with respect to proximate causes and of *inclusion* of causes in fact.

7. See PROSSER, TORTS 323 (1941).

8. GREEN, RATIONALE OF PROXIMATE CAUSE, 136 (1927); Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 474, 476 (1950). Of course, if unwarrantably confused with other aspects of a negligence case, the "causation" issue thus created may appear extremely complex.

9. See James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 204 *et seq.* (1951). The test of legitimacy of inferences from circumstantial evidence is discussed in that article, at 185 *et seq.*

on credibility of witnesses and the evaluation of conduct.<sup>10</sup> But there is a substantial number where causal relation rests on inference from circumstantial evidence, and in them is found the same test of delusive exactness that is generally used to gauge the legitimacy of the basis for an inference from circumstantial evidence. "Where," the New York court has said, "the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable that the injury was the result of one cause as the other, plaintiff cannot have a recovery since he has failed to prove that the negligence of the defendant caused the injury."<sup>11</sup> But here, as elsewhere, this test permits wide latitude where facts are meager and where it is pure matter of guesswork where the greater probabilities lie. A man is found dead at the foot of an unlighted apartment hallway,<sup>12</sup> or at the bottom of an elevator well one of the entrances to which was left unguarded,<sup>13</sup> or at a railroad crossing after the passing of a train that failed to whistle.<sup>14</sup> Death occurred at the unsafe place, or at the hands of the negligently operated agency, but did it occur because of the defect or the negligence? Would the precautions demanded by reasonable care have averted the accident? Obviously no one knows—moreover no one even knows what the probabilities are, and the courts are free to choose either a

10. Thus, where there are eye witnesses to an accident, their testimony will generally suffice to establish defendant's breach of duty and direct causation of plaintiff's injuries.

11. *Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y. 1, 7, 14 N.E.2d 828, 829 (1938). See also *Alling v. Northwestern Bell Tel. Co.*, 156 Minn. 60, 63, 194 N.W. 313, 314 (1923) ("The burden is on the plaintiff to show that it is more probable that the harm resulted in consequence of something for which the defendant was responsible than in consequence of something for which he was not.") and *Ramberg v. Morgan*, 209 Iowa, 474, 487, 218 N.W. 492, 498 (1928) ("Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this court and by other courts." Quoted with approval in *Frye v. City of Detroit*, 256 Mich. 466, 470, 239 N. W. 886, 887 (1932)).

*Cf.* the more liberal statement of the test found in *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, 701, 117 N.W. 1063, 1068 (1908) and quoted with approval in *Bock v. Fellman Dry Goods Co.*, 212 S.W. 635, 637 (Tex. Civ. App. 1919) ("A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result.").

12. *Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y. 1, 14 N.E.2d 828 (1938); *Wolf v. Kaufmann*, 227 App. Div. 281, 237 N.Y. Supp. 550 (1st Dep't 1929); *cf.* *Bornstein v. Faden*, 149 App. Div. 37, 133 N.Y. Supp. 608 (1st Dep't 1912), *aff'd* 208 N.Y. 605, 102 N.E. 1099 (1913); *Reynolds v. Tex. & P. Ry. Co.*, 37 La. Ann. 694 (1885); *Paine v. Gamble Stores*, 202 Minn. 462, 279 N.W. 257 (1938).

13. *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N.W. 653 (1894); *Bock v. Fellman Dry Goods Co.*, 212 S.W. 635 (Tex. Civ. App. 1919); *McCowat-Mercer Printing Co. v. Taylor*, 115 F.2d 868 (6th Cir. 1940).

14. *Puckhaber v. So. Pac. R. Co.*, 132 Cal. 363, 64 Pac. 480 (1901); *Burlington-Rock Island R. Co. v. Ellison*, 140 Tex. 353, 167 S.W.2d 723 (1943). *Cf.* *Woodworth v. N.Y. Central R. Co.*, 149 Ohio St. 543, 80 N.E.2d 142 (1948), soundly criticized in a Note, 18 U. of CIN. L. REV. 371 (1949).



postulate which will let the jury draw an inference of negligence, or its opposite.

On the meager kind of showing described, therefore, it is not surprising to find variant results.<sup>15</sup> Courts which take a strict attitude stress the fallacy of reasoning *post hoc ergo propter hoc*,<sup>16</sup> and the likelihood of explanations involving no causal relation: "It is a matter of common knowledge that people sometimes fall downstairs in broad daylight";<sup>17</sup> the pedestrian who failed to hear the train might well not have heard the whistle, perhaps he fainted on the tracks,<sup>18</sup> and so on.<sup>19</sup> Courts which take a sympathetic view point out that defendant's negligence greatly multiplied the chances of an accident of just the kind plaintiff claims happened, that the proven facts are entirely consistent with its having happened that way, and that the evidence does not strongly suggest an alternative explanation.<sup>20</sup>

15. On nearly identical facts even the same judge may come to contradictory conclusions at different times. Compare *Wolf v. Kaufmann*, 227 App. Div. 281, 237 N.Y. Supp. 550 (1929) (denying recovery for death of plaintiff's intestate found unconscious at foot of stairway unlighted in violation of statute) with *Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y. 1, 14 N.E.2d 828 (1938) (directly opposed). Both opinions were by Finch, J.

16. See, e.g., *Springer v. Security Nat. Bank, & Co.*, 175 S.W.2d 797 (Mo. 1943) (connection between alleged negligence of broker and loss to customer not established); *Payne v. Chandler*, 41 Ga. App. 385, 153 S.E. 96 (1930) (evidence that plaintiff suffered pain in heart and other ailments after dentist caused her to swallow unidentified, unpleasant tasting liquid is insufficient to authorize inference of causal relation); *Kramer Service v. Wilkins*, 184 Miss. 483, 186 So. 625 (1939) (connection between traumatic injury to hand and cancer of skin at point of injury not established).

But cf., *Reynolds v. Tex. & P. Ry. Co.*, 37 La. Ann. 694 (1885) in which the court recognized the "distinction between *post hoc* and *propter hoc*," but found for the plaintiff anyway because "the whole tendency of the evidence connects the accident with the negligence."

17. Dissenting opinion by McLaughlin, J. in *Bornstein v. Faden*, 149 App. Div. 37, 42, 133 N.Y. Supp. 608, 611 (1st Dep't 1912), *aff'd*, 208 N.Y. 605, 102 N.E. 1099 (1913). See also *Wolf v. Kaufmann*, 227 App. Div. 281, 237 N.Y. Supp. 550 (1st Dep't 1929).

18. *Puckhaber v. So. Pac. R. Co.*, 132 Cal. 363, 64 Pac. 480 (1901).

19. For example, the unsympathetic rejection of inferences as to the cause of the airplane crash in which the plaintiff's decedent was killed in *Morrison v. LeTourneau Co. of Georgia*, 138 F.2d 339 (5th Cir. 1943), criticized in Note, 38 ILL. L. REV. 326 (1944).

20. See *Reynolds v. Tex. & P. Ry. Co.*, 37 La. Ann. 694, 698 (1885) ("Where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury."); *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, 117 N.W. 1068 (1908) (statement quoted in note 11, *supra*); *Emery v. Tilo Roofing Co.*, 89 N.E. 165, 195 Atl. 409 (1937); *Gates v. B. & M. R. Co.*, 255 Mass. 297, 151 N.E. 320 (1926); *Burlington-Rock Island R. Co. v. Ellison*, 140 Tex. 353, 167 S.W.2d 723 (1943); *Texas & N. O. R. Co. v. Ewing*, 46 S.W.2d 398 (Tex. Civ. App. 1931); *Bornstein v. Faden*, 149 App. Div. 37, 133 N.Y. Supp. 608 (1st Dep't 1912), *aff'd*, 208 N.Y. 605, 102 N.E. 1099 (1913); *Cornbrooks v. Terminal Barber Shops, Inc.*, 282 N.Y. 217, 26 N.E.2d 25 (1940); Note, 48 MICH. L. REV. 536 (1950). Cf. Note 42, *infra*.

In most cases the facts are not as meager as those described above and the additional evidence generally reduces the area of uncertainty and enables the court to make a much more sure-footed judgment on the matter of probabilities, though even here there is often room for difference of opinion. On the whole courts have tended to view with liberality the legitimacy of the inference of causal relation in these cases. Thus where it appears *how* an accident happened and also that the victim *might* have saved himself by taking advantage of a precaution which it has been shown defendant negligently failed to afford, courts have generally let a jury find the failure caused the harm, though it is often a pretty speculative matter whether the precaution would in fact have saved the victim.<sup>21</sup> Of course if the possibility of salvation is too clearly foreclosed by the facts of a given case, the inference may not be drawn.<sup>22</sup> Grade crossing collisions furnish familiar examples.

21. See RESTATEMENT, TORTS § 432, comment c. (1934). In *Zinnel v. U.S. Shipping Board*, 10 F.2d 47, 49 (2d Cir. 1925), the issue was whether a guard rope, the absence of which constituted the alleged negligence of the defendant, would have prevented the plaintiff's intestate from being washed overboard. L. Hand, J., said, in reversing a judgment dismissing the complaint: "About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not . . . justified, where certainty is impossible, in insisting upon it. We cannot say that there was no likelihood that a rope three feet above the deck . . . would not have saved the seaman. . . . Considering that such lines were run for the express purpose, among others, of protecting seamen, we think it a question about which reasonable men might at least differ whether the intestate would not have been saved had it been there." See also *Kirincich v. Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940) (seaman who could not swim fell overboard and was tossed a one inch heaving line which landed two feet from where he was struggling; court found failure to heave available ring buoy to be the cause in fact of the drowning. ". . . we think he might (the appropriate grammatical mood) have saved himself through the help of something he could more easily grab." *Id.* at 164); and *Harris v. Pennsylvania R. Co.*, 50 F.2d 866 (4th Cir. 1931) (*semble*, but Harris was a good swimmer and therefore there was even greater probability of his reaching a ring buoy or heaving line, both of which were available, had defendant's servants thrown one).

22. *N.Y. Cent. R. Co. v. Grimstad*, 264 Fed. 334 (2d Cir. 1920) contrasts nicely with the cases cited in note 21 and illustrates the point of difference made in the text. The man overboard could not swim, but was seen by his wife while he was still struggling. She rushed back into the cabin for a line, but when she returned he had disappeared. The negligence alleged was the failure to equip the barge with a life buoy, but the court found any causal connection between this failure and the drowning to be "pure conjecture and speculation". There was nothing to show that if there had been a life buoy on board the wife would have got it sooner than she got the small line. *Ford v. Trident Fisheries Co.*, 232 Mass. 400, 122 N.E. 399 (1919) is similar (negligence with regard to readiness of lifeboat immaterial as man disappeared immediately upon falling overboard, and therefore could not have been saved even if defendant had not been negligent).

It will be recognized that these cases illustrate the converse of the "but for" rule: If the accident would have happened without defendant's negligent act, then such is not the cause of it. See *Russo v. Aucoin*, 7 So.2d 744 (La. App. 1942) (negligence of D<sub>1</sub> in pulling away from edge of road without signalling held not to be cause of accident

Where the victim's automobile is driven onto the crossing immediately in front of an obvious and very audible train the jury still may find that the driver's oblivious attention would have been arrested in time if the whistle had been blown.<sup>23</sup> But where the automobile is driven into the sixtieth car of a freight train at an open and unobstructed crossing in the night time, the absence of an unlighted warning sign (if proven) could scarcely be the cause of the accident. "[I]f travelers on the highway could not see the moving cars ahead of [them], they could not see the sign."<sup>24</sup>

A recent case has perhaps introduced a new technique for dealing with the "equal probability" problem, at least in a limited type of situations. In *Summers v. Tice*,<sup>25</sup> two members of a hunting party fired simultaneously at game. A pellet of shot entered the eye of a third member of the party whom the others should have known to be dangerously near their line of fire. There was no way to tell from whose gun the pellet came. In a suit against both, the California court held them both liable to plaintiff. Yet only one defendant caused the damage and in the case against each it is obvious that plaintiff could not prove this element by the *greater probability*. The result actually does no more violence

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in which D<sub>1</sub> (going southward, as was D<sub>2</sub>) came speeding around blind curve, saw D<sub>2</sub> in his path, but being unable to stop by reason of defective brakes, grazed D<sub>2</sub>'s car and ploughed into the plaintiff's truck, which was going northward; even if D<sub>1</sub> had signalled the accident would have happened the same way); *Feeherty v. Sullivan*, 129 S.W. 2d 926 (Mo. App. 1939) (failure to warn by sounding horn not proximate cause of injury where person to be warned and complaining of the failure was aware of the impending danger); *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N.W. 1091 (1893) (failure to indicate location of, or to fence in, hole in ice not the cause of the drowning of runaway horses since the horses could not have been halted or saved had all these precautions been taken); *City of Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300, 7 A.L.R. 129 (1918) (negligence of city in construction or maintenance of spillway not the cause of overflow of pond to plaintiff's damage, where extraordinary rainfall would have caused pond to overflow its embankment in any event).

23. *Davis v. Boggs*, 22 Ariz. 497, 199 Pac. 116 (1921); *Johnson v. Southern Pac. Co.*, 105 Cal. App. 340, 288 Pac. 81 (1940). Cf. *Faust v. Philadelphia & R. Ry. Co.*, 191 Pa. 420, 43 Atl. 329 (1899); *Gregory v. Seaboard Air Line Ry. Co.*, 142 Va. 750, 128 S.E. 272 (1925).

Cf. cases in which the approach of a train was unknown to the plaintiff until both he and it were at the crossing, the train having negligently failed to signal until it was almost upon the crossing, and the noise of the belated signal instead of alerting and saving the plaintiff caused his injury. See *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679 (1874) (plaintiff's horses frightened by train's signal); *Walling v. Central R. Co. of N. J.*, 82 N.J.L. 506, 81 Atl. 987 (1911) (semble); *Louisiana & Ark. Ry. Co. v. Nix*, 94 Ark. 270, 126 S.W. 1076 (1910) (semble).

Of course, where the engine was not visible or audible—*e.g.*, if it is diesel powered or a wind of great intensity is blowing—the jury will be allowed to find the failure of the train to sound a warning to be the proximate cause of a death occurring at a crossing. See *Burlington-Rock Island R. Co. v. Ellison*, 140 Tex. 353, 167 S.W.2d 723 (1943).

24. *Texas & N.O. RR. v. Compton*, 135 Tex. 7, 11, 136 S.W.2d 1113, 1115 (1940); favorably commented upon by Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 477 (1950).

25. 33 Cal.2d 80, 199 P.2d 1 (1948).

to the equal probability rule than many of the instances just cited—it simply conflicts with that rule more dramatically. The court frankly faced this problem, pointed out that ordinarily defendants would be in a far better position than plaintiff to offer evidence as to cause, and concluded, "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest."<sup>26</sup> This is like the technique used by the same court in the *res ipsa loquitur* case of *Ybarra v. Spangard*<sup>27</sup> but has even greater claim to acceptance here where both defendants have been shown negligent.<sup>28</sup> The alternative would turn the innocent victim away without redress and exonerate two admitted wrongdoers, one of whom admittedly caused the harm. Both the fault principle and the objective of compensation are flagrantly violated by any such result, and it would be a sterile and rigid procedure indeed that would force it in the teeth of all the policies of the substantive law.<sup>29</sup> If the reasoning of the Cali-

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26. 33 Cal.2d 80, 86, 199 P.2d 1, 4 (1948).

27. 25 Cal.2d 486, 154 P.2d 687 (1944); 208 P.2d 445 (Cal. Dist. Ct. App. 1949). In this case, discussed in James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 207 *et seq.* (1951), the plaintiff sued the four doctors and two nurses who attended him while he was undergoing an appendectomy for damages for a traumatic injury to his shoulder suffered while he was unconscious. The court said that under the circumstances "all those defendants who had any control over his body or the instrumentalities which might have caused the injury may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." 25 Cal.2d 486, 494, 154 P.2d 687, 691 (1944).

28. Seavey says he knows of no other case "in which it has been held that the plaintiff has sustained the burden of proof where there was no evidence that it was more likely than not that a defendant caused the plaintiff's harm". Seavey, *Res Ipsa Loquitur, Tabula in Naufragio*, 63 HARV. L. REV. 643, 648 (1950). On the ground stated in the text, however, he feels that the Summers case can be more readily supported than the *Ybarra* case. *Ibid.* Any such distinction rests, of course, on accepting the importance of fault as a criterion of liability. The reasoning in the Summers case would probably have been approved by such authorities as Wigmore and Carpenter. See Note, 17 ILL. L. REV. 458 (1923); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 406 (1932).

Other cases have reached a like result where the plaintiff was not a member of the party, on a theory of concerted action or joint enterprise. *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120 (1906); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1927); *cf.* *State v. Newberg*, 129 Ore. 564, 278 Pac. 568 (1929); *Regina v. Salmon*, (1880) 6 Q.B.D. 79.

29. It should never be forgotten that procedure should be the handmaiden, not the mistress, of justice. This does not mean, of course, that the fundamental guarantees of procedural due process are not vitally important. They are. But an observance of them will always mean that rights and liabilities under the substantive law will in some cases be unenforceable. And that is a *cost*, not an *advantage*, of these guaranties. Whenever a procedural rule will consistently work to subvert substantive justice, it should be scrutinized to see whether any fundamental guaranty requires the rule to persist in such a form. Here clearly it does not. Even granting sacredness to the fault principle, there are many instances where procedural burdens have been shifted by statute or judicial ruling

fornia court is accepted, interesting questions will come up as to its limits: Will it apply to cases where one or more of the wrongdoers is not before the court as a defendant? Will it cover the case where each of several defendants has caused some harm but it cannot be told how much?<sup>30</sup>

In this matter of proof of causal relation, as well as in other issues, qualified opinion evidence may be received in appropriate cases.<sup>31</sup> In connection with it two questions of sufficiency may arise. If in any given case the question of causal relation is so esoteric that lay minds cannot form any intelligent judgment about it without expert aid, opinion evidence from qualified witnesses may be required as it sometimes is on the question of appropriate standards of conduct.<sup>32</sup> Probably no more crystallized rule than this can be formulated. The courts have proceeded on a case to case basis, and there are few decisions denying recovery which have laid stress on the want of expert evidence as to the cause in fact of the accident.<sup>33</sup> It should be noted that where the doctrine of *res ipsa loquitur* is applied on the basis of judicial notice, expert evidence is dispensed with upon this issue as upon any other.<sup>34</sup> Expert evidence is often

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on the basis of considerations like those present here. *Res ipsa loquitur* and the presumption against bailees furnish ready examples. For a narrow view of the *Summers* case, however, see Note, 37 Geo. L.J. 627 (1948).

30. See the opinion of the court in the *Ybarra* case, 25 Cal.2d 486, 494, 154 P.2d 687, 691 (1944).

31. See note 33 *infra*, for some recent cases in which it has played a significant role in the cause issue.

32. See Morris, *The Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEX. L. REV. 1, 10 *et seq.* (1947).

33. Two such cases are *Blarjeske v. Thompson's Restaurant Co.*, 325 Ill. App. 189, 59 N.E.2d 320 (1945) (expert was not asked his opinion as to whether condition of meat caused plaintiff's illness; *held*, question of proximate cause left in realm of speculation, surmise and conjecture even though nearly all other evidence pointed very strongly to a causal relation) and *Goodwin v. Misticos*, 42 So.2d 397, 402 (Miss. 1949) ("The fact whether the matter vomited up by Mr. Goodwin contained corned beef that was infected by poisonous bacteria was also one capable of direct and demonstrative proof by a chemical analysis"). There are several recent cases in which such evidence was offered where the court might well have found the lack of it fatal. See *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 617 (1949) (expert traced explosion of liquefied natural gas to negligence of manufacturer of tank in which it was stored) and *National Lead Co. v. Schufft*, 176 F.2d 610 (8th Cir. 1949) (experts ascribe puffs of flame and explosions to large amounts of floating humus dust in the air). Cf. *Western Tel. Corp. v. McCann*, 128 Tex. 582, 99 S.W.2d 895 (1937) (defendant's experts successfully disproved any causal connection between a stroke of lightning coupled with the admitted negligence of the defendant in the management of its wires and the death of plaintiff's wife by electrocution).

In *Comeau v. Beck*, 319 Mass. 17, 64 N.E.2d 436 (1946) it was the testimony of the defendant's medical expert to the effect that a miscarriage might be produced by "some injury, [or by] the striking of the abdomen," [which] was enough to support a finding that the plaintiff's miscarriage was causally related to the accident."

34. See James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 197, n. 55, 201, 202 (1951). Cf. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L.R.A. 718, 48 Am. St. Rep. 146 (1893), and the discussion of this point in Morris, *Res Ipsa Loquitur in Texas*, 26 TEX. L. REV. 257, 261-2 (1948).

required to establish the causal connection between the accident and some item of physical or mental injury<sup>35</sup> unless the connection is of a kind which would be obvious to laymen (such as a broken leg from being struck by an automobile).

Where opinion evidence is relied on to establish the causal link a question of sufficiency may also arise in deciding whether the opinion has been expressed in such terms as will support the needed conclusion. If a qualified witness gives it as his opinion that the causal relation *did exist* or *probably did exist*, there is not much question about the legal sufficiency of the testimony (subject to general principles governing credibility).<sup>36</sup> But cautious or hostile witnesses are often unwilling to go so far, and there are serious questions and variant rulings about the sufficiency of such expressions as "may have caused," "possibly caused," and the like.<sup>37</sup> Of course other factors in the case may lend

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35. See cases cited in note 37 *infra*.

36. *Tullgren v. Amoskeag Mfg. Co.*, 82 N.H. 268, 133 Atl. 4 (1926); *National Lead Co. v. Schuft*, 176 F.2d 610 (8th Cir. 1949); *Averdieck v. Barris*, 87 Cal. App. 626, 262 Pac. 423 (1927); *Shepard v. Carnation Milk Co.*, 220 Iowa 466, 262 N.W. 110 (1935).

In many cases each side has at least one expert witness who testifies concerning the cause of the injury in definite, unequivocal language. The experts thus diametrically opposed, a jury verdict for either party will be upheld. See *Harris v. Wood*, 214 Minn. 492, 8 N.W.2d 818 (1943) (strong expert testimony to support two alternative theories as to death of decedent, only one of which involved defendant's negligence; jury verdict for plaintiff upheld), discussed in *Morris, Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 187 (1950).

37. "Possibility" of causal relation insufficient: *Mutual Ben. Health & Accident Assn. v. Johnson*, 186 So. 297 (Miss. 1939); *Wood v. W. E. Joyce Co.*, 228 App. Div. 729, 239 N.Y. Supp. 110 (3d Dep't 1930); *Halnan v. New England Tel. & Tel. Co.*, 296 Mass. 219, 5 N.E.2d 209 (1936); *Gerber v. Wloszczynski*, 188 Wis. 304, 206 N.W. 206 (1925). In *Western Truck Lines v. Berry*, 53 Ariz. 216, 87 P. 2d 484, 486 (1939) testimony that "one might . . . say that an accident . . . may or may not have anything to do with it" was held "entirely too indefinite and uncertain" to establish the requisite causal relation. A similar result was reached in *Di Fazio v. J. G. Brill Co.*, 133 Pa. Super. 576, 3 A.2d 216 (1938), the court stating that expert testimony that a causal connection was "extremely possible and likely" would be insufficient.

Of course if the cause and result relationship of the type the plaintiff is urging as the ground of the defendant's liability occurs in only one out of one hundred cases there is insufficient evidence of it to go to the jury in the individual case at bar. *Kramer Service v. Wilkens*, 184 Miss. 483, 186 So. 625 (1939). But a similar result was reached in *Howley v. Kantor*, 105 Vt. 128, 163 Atl. 628 (1933), even though the percentages greatly favored the plaintiff (eighty per cent of cases involved the more serious type of tumor for which she was asking damages) on the grounds that the expert testimony was not directed to the likelihood of the plaintiff's particular tumor being of the more serious type.

On the other hand in *Cornbrooks v. Terminal Barber Shops, Inc.*, 282 N. Y. 217, 26 N.E.2d 25 (1940), expert evidence that a barber's electric vibrator "would have been a competent producing cause" of a detachment of the retina (together with absence of proof of other probable cause) was held to satisfy the requirement as to probability. The Appellate Division had found this evidence insufficient to establish the causal connection. 255 App. Div. 522, 8 N.Y.S.2d 171 (1st Dep't 1938). The case of *Wood*

support to the inference. Thus in a miscarriage case the Massachusetts court has held such an expression sufficient when "taken in connection with the plaintiff's testimony that [her] health was good before the accident" though otherwise it would leave "the issue trembling in the balance."<sup>38</sup>

A distinction should be emphasized at this point. We are concerned here with the *sufficiency*, not the *weight* of the evidence, and on familiar principles plaintiff is entitled to have sufficiency tested on the basis of the evidence most favorable to him.<sup>39</sup> It is only to that version of the evidence therefore that the equal probability test (of the legitimacy of an inference) may properly be applied. It is the jury's function, not the court's, to say whether plaintiff's version of the case is sustained by the greater weight of the evidence.<sup>40</sup> A case therefore in which the evidence most favorable to plaintiff (including the opinion of qualified experts) affords the basis for an inference of cause is not defeated as matter of law by defendant's evidence of a different version of facts or a different theory of cause in fact.<sup>41</sup> Where the evidence stands in that posture, the question of what probably happened in the case is for the jury even though the court might be inclined to accept the defendant's version.<sup>42</sup>

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v. W. E. Joyce Co., *supra*, also involved a claim of traumatic detachment of the retina, with the elimination of other probable causes.

38. *Comeau v. Beck*, 319 Mass. 17, 20, 64 N. E. 2d 436, 437 (1946); *cf. De Filippo's Case*, 284 Mass. 531, 534, 188 N.E. 245, 247 (1933).

39. 9 WIGMORE, EVIDENCE §§ 2494, 2495 (3d ed. 1940).

40. *Id.* § 2551.

41. Unless, in any given case, defendant's evidence is so overwhelming that under general principles reasonable minds could not reject it and accept plaintiff's.

42. The actual decisions recognize this. *National Lead Co. v. Schuft*, 176 F.2d 610 (8th Cir. 1949); *Sears Roebuck & Co. v. Scroggins*, 140 F.2d 718 (8th Cir. 1944); *Turner v. Minneapolis St. Ry. Co.*, 140 Minn. 248, 167 N.W. 1041 (1918); *Tullgren v. Amoskeag Mfg. Co.*, 82 N.H. 268, 133 Atl. 4, 46 A.L.R. 380 (1926); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949). But the reasoning in these cases sometimes fails to describe with accuracy the basis for holding inapplicable the rule that a jury will not be allowed to guess between two equally probable causes. Thus in the *Tullgren* case the court says this equal probability rule "has no application unless the existence of a sufficient cause or causes for the injury aside from the negligence charged, is conceded or conclusively proved." (133 Atl. 4, 7). This statement overlooks the fact that it is the weakness of *plaintiff's case* that usually brings the restrictive rule into play and seems to suggest instead that a plaintiff can get to the jury whenever *defendant's explanation* falls short of certainty. Unfortunately, perhaps, the broad literal implications of this statement do not seem to be borne out by the cases. See, however, Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 399 (1932). Possibly the court in the *Tullgren* case only meant to say that "where a cause is present which might produce a condition that has occurred, and there is no other adequate cause proved, the matter is not within the equipoise rule, and it may, under such conditions be found that the only thing suggested by the evidence which could cause an effect found present, did cause it." *Turner v. Hartford F. Ins. Co.*, 185 Iowa 1363, 1377, 172 N.W. 166, 172 (1919). As we have seen, nearly all the cases which employ even this relaxation of the equal probability formula, could with equal

There is another type of question that presents problems of proof of fact, which is sometimes treated under the heading of cause.<sup>43</sup> This is the question found in negligent entrustment and unlicensed operator cases, namely, whether, in the former, the fact (when proved) of the driver's incompetence can be used as evidence that the accident occurred as a result of this incompetence, and in the latter cases, whether the lack of license is evidence that the driver was unskillful in a way which contributed to the accident. Defendant entrusts his automobile to one he should know is incompetent and the latter injures plaintiff, a lawful user of the highway. Under these circumstances the owner's act is clearly a breach of duty towards plaintiff. But there remains a further question before liability may be imposed. This may be put in terms of causal relation between the negligence and the harm or in terms of whether the injury arose out of the risk which made defendant's entrustment negligent. In either event the factual inquiry is the same, did the injury occur *because* the driver (borrower) was incompetent? Neither analysis will permit recovery if the driver was acting with all due care on this occasion. The result is that the negligence of the driver must be proven (just as in a case of vicarious liability, but for different reasons). The only question is whether proof of his incompetence which was introduced to show the owner's negligence may also be used as evidence of negligent operation in the particular accident in the case. The courts have said not, since on grounds of doubtful validity the evidence would have been incompetent if offered for the latter purpose.<sup>44</sup>

Where the car is entrusted to an unlicensed driver, or where defendant himself drives it without a license, a similar question is presented (if the licensing statute is thought to have safety in mind and not exclusively revenue, or some other unrelated purpose), namely, did the harm result from the want of a license, or (more accurately) because of the risk of unskilled driving which the licensing statute sought to prevent? If the car was driven with all the skill and care the law requires then the harm did not proceed from such a risk; if the car was negligently driven, then it did. The further question then arises: may the want of license be considered as *some* evidence that unskillfulness contributed to the accident? Some courts say no.<sup>45</sup> But this

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logic have been decided for the defendant because plaintiff's proof of cause rested on conjecture. For examples, see cases cited in notes 20, 21 and 23, *supra*.

43. We shall deal with the problem of proof here, and leave for later discussion the problem of whether the question should be assimilated to the issue of cause or the issue of duty. See notes 104-106 *infra*.

44. In nearly all jurisdictions the character or propensity for carelessness of a person charged with a negligent act may not be put in evidence even though it might throw light "on the probability of his having acted carelessly on the occasion in question." See 1 WIGMORE, EVIDENCE § 65 (3d ed. 1940). This matter is discussed in James & Dickinson, *Accident Proneness & Accident Law*, 63 HARV. L. REV. 769, 791 (1950).

45. *Mahowald v. Beckrich*, 212 Minn. 78, 2 N.W.2d 569 (1942) lists several of the jurisdictions in which both questions in the text have been answered in the negative. See also *Morrison v. Le Tourneau*, 138 F. 2d 339 (5th Cir. 1943): "There is argument that the



effectively deprives the victim of any benefit, in a civil case, of a statute concededly passed in part for his protection. Nor does the ruling seem theoretically sound. The legislature has decided that the general safety requires the activity in question to be limited to those who can demonstrate at least a minimum of special skill. It is fair to assume that the unlicensed as a class are far less likely than those licensed to have the skill for which a license is required. And it is certainly true that when the unskilled attempt what it takes skill to do, some of the intangible factors that go to make up lack of skill are far more likely than not to have contributed to any mishap that occurs. Frequently they do this in ways that are hard to prove; moreover, what evidence there is in the matter is likely to be in the defendant's hands. Both probability and policy, therefore, call for the rule that breach of a licensing statute, if it is negligence to the plaintiff at all, should be *prima facie* evidence that it is the "proximate cause" of any injury that ensues.<sup>46</sup>

possession of only a pilot's license is evidence, or the basis of a presumption, that the possessor is lacking in skill as a [commercial] pilot. This does not necessarily follow. He may not have chosen to take further examinations although he might have been abundantly qualified for commercial or transport license for aught the record shows . . . ." *Id.* at 341 (emphasis added). Why does the court insist in talking about possibilities which are patently less than probable? *Smith v. Whitley*, 223 N.C. 534, 27 S.E.2d 442 (1943) is similar. The classic opinion is that in *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197 (1926).

46. Cf. *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920) (fact that unlighted vehicle was struck by another in the dark is evidence that the collision occurred because of the lack of lights). Dean Green agrees with the position stated in the text. See discussion of *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W. 2d 587 (1947) in Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 755, 766 (1950), and see Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B.J. 24, 32 (1950).

The lack of registration for an automobile involved in an accident evokes varied responses from different courts. In the great majority of jurisdictions the driver of an unregistered automobile is not liable to those he injures if he is otherwise exercising due care. *Gilman v. Central V. Ry. Co.*, 93 Vt. 340, 107 Atl. 122 (1919); *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28 (1913). See annotation, 163 A.L.R. 1375 (1946) (citing earlier annotations) and cases cited by Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 410 n.133 (1932). This result should be reached not, as many courts reason, because the violation of the statute is not the proximate cause of the injury (see, e.g., *Gonchar v. Kelson*, 114 Conn. 262, 158 Atl. 545 (1932), but because the plaintiff is not within the scope of duty owed by the defendant with respect to registration. See discussion of the *Gonchar* case by Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B.J. 24, 28-30 (1950). See further discussion of this point in the text, *infra* at note 107.

Massachusetts is probably the only state which still considers the unregistered vehicle an outlaw or trespasser on the highway to which no duty is owed, *Chase v. N.Y. Cent. & H.R.R. Co.*, 203 Mass. 137, 94 N.E. 377 (1911), and which is responsible for all harm, regardless of negligence. *McDonald v. Dundon*, 242 Mass. 229, 136 N.E. 264 (1922). For some of the ridiculous bases upon which an automobile has been found to be unregistered in Massachusetts, see Comment, 10 B.U.L. REV. 211 (1930). But Massachusetts has apparently come to the point where it is at least unwilling to extend this rule to new situations. See *Galbraith v. Levin*, 323 Mass. 255, 81 N.E.2d 560, 563 (1948) in which the owner was held *not* liable for injuries inflicted by a thief who was negligently driving his

*Multiple Causes in Fact:*

It was pointed out at the beginning of the last section that no injury proceeds from a single cause. But by law if *no injury* would have occurred to plaintiff *but for* defendant's conduct, then defendant is liable—if at all—for the whole injury. This is true regardless of its position in the string of acts leading to the injury even though one or more of the other causes contributing to the result also involved wrongdoing on the part of other persons. In that case those others may also be liable but the law attempts no apportionment of damages among such tortfeasors, though a plaintiff is entitled only to a single satisfaction of his claim.<sup>47</sup> So if two negligently driven cars collide and the collision injures a third person, both drivers are liable for his injury; or if A negligently leaves an obstruction in the highway and B negligently drives into it so that injury to C ensues, A and B are both liable to C.

A more serious question arises where defendant's negligence and another cause for which defendant is not responsible would each have caused the *whole* injury even in the absence of the other cause. Where both causes involve the wrongful acts of legally responsible human beings there is virtual unanimity among courts in holding both (or either) liable for the whole injury just as in the situations described in the last paragraphs.<sup>48</sup> A leading case is *Corey v. Havener*,<sup>49</sup> in which the two defendants on motorcycles passed plaintiff's horse, one on either side, and so frightened it by their speed, noise, and smoke that the horse ran away and injured plaintiff. Plaintiff had recovery against both defendants in spite of the obvious probability that either motorcycle alone would have produced the result,<sup>50</sup> and the fact that each was sued separately (the actions were tried together).

The authorities are divided, however, in the case where the other cause (which would alone have produced the injury) is a natural force or the innocent act of another.<sup>51</sup> The case for denying liability here has been well put

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car which was unregistered and in which, in violation of a statute, he had left the keys. This decision directly overruled *Malloy v. Newman*, 310 Mass. 269, 37 N.E.2d 1001 (1941), which involved very similar facts and which rested heavily on the fact that the automobile was unregistered.

47. PROSSER, TORTS § 109 (1941).

48. See cases cited by Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 413 nn.57-63 (1939); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 433 n.131-34 (1937).

49. 182 Mass. 250, 65 N.E. 69 (1902).

50. As a matter of fact this point was not mentioned by the court but the case has been almost universally cited for it. Defendants' contentions on appeal centered around the impossibility of telling which motorcycle frightened the horse. The court decided that under the evidence the jury was warranted in finding that they both did, and that defendant was not entitled to instructions requiring the jury to find which of the defendants was to blame and to assess all the damages only against such one (if either).

51. *E.g.*, two fires, one negligently set by the defendant and the other the product of nature (lightning) combine and are blown across the plaintiff's property, burning his house. Or, a boy loses his balance and is falling to his death (or to serious injury) on

by Edgerton. He concedes that defendant's act stands in the same logical relation to the result "whether the other is a wrongdoer, an innocent person, or a thunderstorm." "But," he continues, "our sense of justice demands the imposition of liability when the harm should not have happened but for the wrongful act of human beings, while it does not make the same demand when the harm would have been produced by an innocent person or a natural force, if there had been no wrongful human action."<sup>52</sup> The opposing view, which appears to be of greater merit, rejects this reasoning and holds the wrongdoer in the case put.<sup>53</sup> In terms of the fault principle the argument for the majority position is that after all defendant has committed a wrong and this has been in fact a cause of the injury; further, such negligent conduct will be more effectively deterred by imposing liability than by giving the wrongdoer a windfall in cases where an all-sufficient innocent cause happens to concur with his wrong in producing harm. If the objective of compensating accident victims be stressed, the scale is tipped heavily in favor of liability, however evenly balanced the opposing arguments in terms of fault.

So far we have been dealing with cases where the harm is not even theoretically apportionable, either because none of it would have happened but for defendant's negligence or because there would be no feasible way, even in the light of omniscience, to attribute any identifiable part of it to defendant's act rather than another cause, as in the case of the two fires which unite to burn property which either alone would have consumed. But there are many situations in which each of several causes (without the concurrence of any of the others) produces *some* (but not *all* the) harm. In such a case it may be hard or even impossible on the facts practically available to tell just how much of the harm each of these causes brought about, but at least in *theory* (i.e. to the eye of omniscience) they are capable of separation. Where this is the case, each of the defendants responsible for these causes may still be liable for the whole injury. This will be so where they acted in concert or in the course of a joint enterprise so that each is responsible vicariously

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rocks below when he is caught upon the defendant's wires, with respect to which the defendant is negligent toward him, and electrocuted. Or, a house so undermined by the pounding of the sea that it would topple at the next high tide is negligently destroyed by defendant's fire hours before high tide occurs. See Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1135 (1934).

52. Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211, 343, 346, 347 (1924). This position is also taken by Peaslee, *Multiple Causation & Damage*, 47 HARV. L. REV. 1127 (1934), and is supported in the cases by *Cook v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 98 Wis. 624, 74 N.W. 561, 40 L.R.A. 457, 67 Am. St. Rep. 830 (1898) (two fires, one caused by the defendant's negligence and the other of natural origin); *Geuder, & Co. v. Milwaukee*, 147 Wis. 491, 133 N.W. 835 (1911) (approves *Cook* case rule; plaintiff's basement flooded as result of extraordinary rain and bursting of defendant's sewer).

53. *Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 146 Minn. 430, 179 N.W. 45 (1920) repudiates the rule of the *Cook* case in toto, on identical facts. Carpenter, *Concurrent Causation*, 83 U. OF PA. L. REV. 941 (1935) approves this position, as does the RESTATEMENT, TORTS § 432, illustration 7 (1934).

for the acts of the others.<sup>54</sup> The notion of action in concert involves the intentional aiding or abetting of a wrong, the "coming [together] to do an unlawful act,"<sup>55</sup> as where several ruffians set upon a man and beat him, each inflicting separate wounds. This concept has limited application to the field of accidental injuries. Joint enterprise is more appropriate to this field but this concept is rarely invoked except in connection with contributory negligence.<sup>56</sup>

Even where defendants are not all liable for the whole injury, there are some situations where one is liable for the whole but the other is not. Where, for instance, A's act injures plaintiff and also foreseeably exposes him to further injury by B, A is liable for the whole harm, but B only for that part of it which he inflicted. That would be the case if one driver negligently ran down a pedestrian and another driver ran over him as he was lying there, breaking his leg.<sup>57</sup> Another situation where this notion is commonly applied is that where, after defendant negligently injures plaintiff, a doctor's treatment of the injury negligently makes it worse. The defendant is liable for the whole injury including the aggravation although the doctor would of course be liable only for the aggravation his malpractice caused.<sup>58</sup> Another case in which one defendant

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54. HARPER, LAW OF TORTS § 302 (1933); PROSSER, TORTS §§ 65, 109 (1941).

55. Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613); Williams v. Sheldon, 10 Wend. 654 (N.Y. Surr. 1833); and cases cited in Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 429 (1937). Of course, all the defendants will be jointly liable for the entire damage if it is viewed as single and indivisible. See note 72 *infra*.

56. PROSSER, TORTS § 65 (1941).

57. Adams v. Parrish, 189 Ky. 628, 225 S.W. 467 (1920). See also Morrison v. Medaglia, 287 Mass. 46, 191 N.E. 133 (1934) (successive automobile collisions); Sawdey v. R. W. Rasmussen Co., 107 Cal. App. 467, 290 Pac. 684 (1930) (similar); Thornton v. Eneroth, 177 Wash. 1, 30 P. 2d 951 (1934) (similar); but cf. Young v. Dille, 127 Wash. 398, 404, 220 Pac. 782, 784 (1923) ("[N]either of the actors in the wrong could be responsible for the injuries caused by the other.").

58. RESTATEMENT, TORTS § 457 (1934) is in accord so far as risks normally recognized as ordinarily incident to medical treatment are concerned. See also Sauter v. N.Y. Cent. & H. R. R. R., 66 N.Y. 50 (1876); Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N.W. 891 (1906); Covington v. Keal, 280 Ky. 237, 133 S.W.2d 49 (1939); Ross v. Stamford, 88 Conn. 260, 91 Atl. 201 (1914); and cases in Notes, 8 A.L.R. 506 (1920); 39 A.L.R. 1268 (1925); 126 A.L.R. 912 (1940); 79 A.L.R. 351, 369 (1932).

If this were not so, the situation would be intolerable unless the two actions were joined or tried together. The first defendant could escape liability for the aggravation by showing the doctor's negligence to one jury, leaving plaintiff with only a malpractice case—one of the trickiest and most difficult to maintain in the field of accident law.

A strange and unjust wrinkle is added in many courts. If the defendant selects the doctor whose negligence aggravates the original injury he (defendant) is *not* responsible for the doctor's actions provided he is not negligent in the selection or employment of the doctor. This *faux pas* (Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 491, 538 (1932)) rests squarely on the identity of the party selecting the doctor and results from treating the problem not as one of duty or causation but as one of "master and servant." The reasoning, which is entirely inapposite to the case, is that the defendant-doctor relationship is *not* one imposing vicarious liability on the defendant as master for the doctor as servant. A straw man is created

will be liable for all the injury is that in which he is vicariously responsible for the conduct of the others acting with him, and each inflicts some injury.<sup>59</sup>

Except in the situations described in the last two paragraphs, the prevailing rule is that where each of several defendants causes only *part* of defendant's injury, so that the parts would be capable of separation if all the facts were known, then each is liable only to the extent of that part. Thus where two dogs run together and kill sheep, each of the separate owners of the dogs is liable only for the sheep his dog killed.<sup>60</sup> If each of several riparian owners pollutes a stream somewhat, he is liable only for the damage resulting from his own contribution to the pollution<sup>61</sup> (unless of course it can be said that none of the damage would have resulted but for his contribution<sup>62</sup> in which case

in order to be knocked down, a process which would tend to benefit wealthy or corporate defendants accustomed to having their own medical staff treat their accident victims. The cases are collected in Notes, 8 A.L.R. 506, 515 (1920); 39 A.L.R. 1268, 1269 (1925); 126 A.L.R. 912, 916 (1940). In most of these same jurisdictions the defendant would be responsible for the doctor's negligence if the plaintiff had selected the doctor on grounds that the original defendant's negligence "continued in force" or that "the Doctor's negligence is one of the foreseeable risks which made the defendant's conduct negligent to the plaintiff."

59. Still another application of this principle is found in cases where the defendant's negligence has injured the plaintiff, causing damage for which defendant is liable and leaving plaintiff's body in a weakened condition, susceptible to further harm of the same nature. The defendant is liable for such further harm if it is brought on by a third person and may be so liable if plaintiff himself has caused it. See *Mitchell v. Legarsky*, 95 N.H. 214, 60 A.2d 136 (1948), noted in 2 VAND. L. REV. 329 (1949); Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 44, n.121 (1936); RESTATEMENT, TORTS §§ 458-460 (1934), criticized in Carpenter, *Proximate Cause*, 14 SO. CALIF. L. REV. 1, 416, 449-450 (1941).

60. *Van Steenburgh & Gray v. Tobias*, 17 Wend. 562, 563 (N.Y. 1837) ("The difficulty in estimating the separate injury done by each dog, is not an argument of sufficient strength to warrant the injustice of punishing a man who is entirely innocent."). See also *Russel v. Tomlinson & Hawkins*, 2 Conn. 206 (1817); *Adams v. Hall & Cootwire*, 2 Vt. 9, 19 Am. Dec. 690 (1829); *Denny v. Correll*, 9 Ind. 72 (1857); *Anderson v. Halverson*, 126 Iowa 125, 101 N.W. 781 (1904); *Stine v. McShane*, 55 N.D. 745, 214 N.W. 906 (1927). Cf., however, *Stephens v. Schadler*, 182 Ky. 833, 207 S.W. 704 (1919) in which the court was apparently willing to transfer a concert of action among the dogs to their owners. Cf. also cases in which the injuring animals are kept in a common herd, and the owner of a small portion of the herd is held liable for the total damage. *Wilson v. White*, 77 Neb. 351, 109 N.W. 367 (1906); *Ushirohira v. Stuckey*, 52 Cal. App. 526, 199 Pac. 339 (1921).

61. *Chipman v. Palmer*, 77 N.Y. 51, 33 Am. Rep. 566 (1879); *Martinowski v. City of Hannibal*, 35 Mo. App. 70 (1889); *City of Mansfield v. Brister*, 76 Ohio St. 270, 81 N.E. 631 (1907); *Standard Phosphate Co. v. Lunn*, 66 Fla. 220, 63 So. 429 (1913); *Mitchell Realty Co. v. West Allis*, 184 Wis. 352, 199 N.W. 390 (1924); *Masonite v. Burnham*, 164 Miss. 840, 146 So. 292 (1933). Annotations in 9 A.L.R. 939 (1920); 35 A.L.R. 409 (1925); 91 A.L.R. 760 (1934).

62. Where each of several defendants has inflicted some actual injury, in itself negligible and harmless, but the cumulative effect of the many similar small injuries is some appreciable, serious damage, it would seem to be just to impose liability upon each. The surrounding circumstances (*e.g.*, the high degree of pollution already found in a

he would probably be liable for it all).<sup>63</sup>

Where each of several independent actors has inflicted successive injuries, each actor's liability is limited again to his own contribution to the injury (except as we have seen the original actor will be liable for the later injuries if they arise from a risk the likelihood of which made his conduct negligent).<sup>64</sup> A like result is reached when the same defendant by two successive acts causes separate injuries, and the defendant is not liable for the first but is for the second act. Thus where a trolley runs down a careless pedestrian and the

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stream) make the action of each (*e.g.*, the addition of but a slight legally innocent discharge) unreasonable, and subject him to liability even though his conduct if it occurred by itself would be innocent. Statements to this effect are found in *Woodyear v. Schaefer*, 57 Md. 1, 10, 40 Am. Rep. 419 (1881) (pollution of river); *Hillman v. Newington*, 57 Cal. 56 (1880) (use of water in which plaintiff had prior rights); *United States v. Luce*, 141 Fed. 385, 411 (C.C.D. Del. 1905) (smoke from two factories); *Hill v. Smith*, 32 Cal. 166 (1867) (pollution); *D. & H. Canal Co. v. Torrey*, 33 Pa. 143 (1859) (filling river with refuse); *Lawton v. Herrick*, 83 Conn. 417, 428, 76 Atl. 986 (1910) (pollution).

A slightly different situation is presented in the illustration suggested by Kay, J., in *Blair & Sumner v. Deakin*, 57 L.T.R. 522, 525 (Ch. Div. 1887) (each of two manufacturers discharges a chemical, harmless in itself, which combines chemically with the other's discharge to cause a pollution).

63. *Cf. Wright v. Cooper*, 1 Tyler 425 (Vt. 1802) (two dams across creek cause flooding of plaintiff's land; neither dam alone would have caused any damage); *Town of Sharon v. Anaheim Realty Corp.*, 97 Vt. 336, 123 Atl. 192 (1924) (ice jam caused by pier of one defendant and dam of other, neither of which alone could have caused any damage); *Weideman v. East Jersey Water Co.*, 91 Atl. 338 (N.J. 1914). *But cf. Woodland v. Portneuf Marsh Irr. Co.*, 26 Idaho 789, 146 Pac. 1106 (1915) (damages to be apportioned among defendants).

Perhaps in these cases, before liability is imposed, the plaintiff will be required to establish that the defendant knew or had reason to know of the circumstances which made it likely that his conduct would cause injury. For suggestive analogies, see *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 602 (1877); *McKay v. Southern Bell T. & T. Co.*, 111 Ala. 337, 19 So. 695 (1896).

64. Notes 57 and 58, *supra*, deal with situations where an original wrongdoer will be liable for harm done by later wrongdoers. Cases where each of successive wrongdoers was held liable only for the amount of harm directly contributed by himself, are: *Freshwater v. Bulmer Rayon Co.*, (1933) Ch. 162 (pollution of stream by two defendants, operating same plant in successive periods); *Coleman Vitrified Brick Co. v. Smith*, 175 S.W. 860 (Tex. Civ. App. 1915) (damages to plaintiff through operation of brick kiln by successive owners on adjacent property); *Albrecht v. St. Hedwig's Soc.*, 205 Mich. 395, 171 N.W. 461 (1919) (successive assaults upon the plaintiff); *McGannon v. Chicago & N.W. Ry. Co.*, 160 Minn. 143, 199 N.W. 894 (1924) (workman contracted silicosis through negligence of successive employers). *Cf. Golden v. Lerch Bros.*, Minn. Sup. Ct., 1937 (on facts similar to the McGannon case the court held that both defendants were properly joined in one action and each was liable for the entire damage since there could be no logical basis for assigning part of the damage to one defendant and part to another. This result was approved by Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 443, n. 182 (1937), and Note, 21 MINN. L. REV. 616 (1937). However, on reargument the court completely changed its position and held, with the justice who wrote the former opinion dissenting, that under the evidence one defendant could be held, the other could not; 281 N.W. 249 (Minn. 1937)).

motorman injures him again through negligence in trying to extricate him from his position of danger, the company will be liable for the second but not for the first injury.<sup>65</sup> And an employer who exposed his workman to the danger of silicosis over a period of time extending back beyond the statute of limitations will be liable for the aggravation of the disease caused by the exposure within the statutory period.<sup>66</sup>

At the time of their injuries accident victims are in all sorts and manners of diverse conditions, physically, mentally, financially, and in many other ways. And these preexisting conditions may have the greatest bearing on the extent of the injury actually suffered by any particular plaintiff in a given case. Thus the same slight blow in the abdomen might cause only fleeting discomfort to a man but a miscarriage to a pregnant woman.<sup>67</sup> Or a slight touch, scarcely noticed by the recipient, might be so aggravated by the presence of latent disease at the point of impact as to cause the loss of the use of a limb.<sup>68</sup> These situations too involve concurring causes just as do the situations we have been discussing before in this section. And the cases will be seen to fall into the same patterns. Thus defendant's act may be a cause in fact of the whole injury (as in the case of the miscarriage or the diabetic's leg), and where it is not even theoretically divisible defendant will be liable for the whole of it.<sup>69</sup> But defendant's act may only aggravate an illness or injury which would have caused some harm anyway, or accelerate a loss—death, for instance, which would

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65. *Deutsch v. Connecticut Co.*, 98 Conn. 490, 119 Atl. 891 (1923). See also *Kinderavitch v. Palmer*, 127 Conn. 85, 15 A.2d 83 (1940) (careless plaintiff struck by eastbound train and hurled, unconscious, onto westbound track where train ran over him and severed his arm).

66. *Pieczonka v. Pullman Co.*, 89 F.2d 353 (2d Cir. 1937) (plaintiff must establish the injuries inflicted within the period for which the defendant is responsible). Cf. *Golden v. Lerch*, 281 N.W. 249, 253 (Minn. 1937), which agrees in principle, but in which the court states "the statute [of limitations] is generally considered an affirmative defense. . . . Where part of the plaintiff's demand is barred and part is not, the defendant is obliged to prove specifically the part that falls within the protection of the statute."

67. Cf. cases where recovery has been allowed for miscarriage caused by fright, e.g., *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892). But cf. *Tort Liability for Miscarriage "Caused" by Fright*, 15 U. OF CHI. L. REV. 188 (1947).

68. *Vosburg v. Putney*, 78 Wis. 84, 47 N.W. 99 (1890); 80 Wis. 523, 50 N.W. 403 (1891); 86 Wis. 281, 56 N.W. 915 (1893). Cf. *O'Bauer v. Katz Drug Co.*, 49 S.W. 2d 1065 (Mo. App. 1932) (because of menopause woman susceptible to serious injury from slight fall); *Louisville & N. R. Co. v. Wright*, 183 Ky. 634, 210 S.W. 184 (1919) (recovery for death from creosote poisoning would be allowed even though decedent peculiarly susceptible to such poisoning).

69. See cases cited in note 68 *supra*; RESTATEMENT, TORTS § 461 (1934); *Owen v. Dix*, 210 Ark. 562, 196 S.W. 2d 913 (1946) (plaintiff's weakened spinal condition set off by injuries received when a passenger in bus which left road); *Larson v. Boston Elevated Ry.*, 212 Mass. 262, 98 N.E. 1048 (1912) (tuberculosis brought out by injury received while on street car); *Maroney v. Minneapolis & St. Louis Ry.*, 123 Minn. 480, 144 N.W. 149 (1913) (woman's internal ailment); RESTATEMENT, TORTS § 458, comment a (1934).

have taken place anyway. And in such a case defendant's liability extends only to the amount of harm which he in fact caused.<sup>70</sup>

As a matter of substantive law these limitations on a defendant's liability seem fair enough. The rub comes from the frequent difficulty of proof. Under a strict technical view plaintiff may be put to the burden of proving by the greater probability not only the fact but the amount of damage which can be traced to defendant's act as a prerequisite to recovering *anything*. This would often lead to the unlovely spectacle of turning a plaintiff away without redress although he has shown that he has suffered some damage at the hands of *each* of several defendant wrongdoers and what the aggregate amount of the damages comes to.<sup>71</sup> To avoid this harsh result, courts have evolved several techniques.

(a) They have tended to find a single indivisible injury in many questionable cases. There is often room for viewing the matter either way, as in a pollution case or smoke or stench nuisance cases, where the *total* condition

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70. *Schwingschlegl v. City of Monroe*, 113 Mich. 683, 72 N.W. 7 (1897) (ankle diseased and injured previously, but defendant liable for increase in pain, suffering, disability and expense incurred by reason of accident in question); *Watson v. Rheinderknecht*, 82 Minn. 235, 84 N.W. 798 (1901) (aggravation of long-standing war injuries); *Gates v. Fleischer*, 67 Wis. 504, 510, 30 N.W. 674 (1886) (plaintiff suffering from blood poisoning; disease aggravated by defendant's malpractice. Court upholds charge that "it will be necessary, as best you may from the evidence, to distinguish the pain, suffering, and injuries or ill health of the plaintiff, if any, chargeable to the fault of the defendant, from those chargeable to her condition when the defendant was called in to treat her.").

71. See *Tucker Oil Co. v. Matthews*, 119 S.W.2d 606 (Tex. Civ. App. 1938) (directed verdict for defendant, one of several negligent polluters of stream, even though plaintiff showed that his negligence caused some damage, because plaintiff did not and could not show *how much* damage resulted from his negligence); *Deutsch v. Connecticut Co.*, 98 Conn. 482, 119 Atl. 891 (1923) (plaintiff's intestate was contributorily negligent when struck by trolley but then, while lying on the tracks, was further injured by negligence of motorman in reversing car; defendant was responsible for injuries inflicted through latter actions of motorman, but since plaintiff did not show which injuries he suffered before the car was stopped and which he suffered by being rolled under the car when it was reversed, jury could only surmise and conjecture on the question of damages; directed verdict for defendant upheld); *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 300 Pac. 31 (1931) (land damaged by deposits of substances negligently permitted to run down ravine by defendant and others; injunction granted but award of damages reversed for lack of specific evidence of defendant's contribution to the total deposit); and Note, 17 ILL. L. REV. 458 (1923). Cf. *Van Steenburgh & Gray v. Tobias*, 17 Wend. 562 (N.Y. 1837), in which plaintiff sued for damages to his sheep done by two dogs, one owned by each of the defendants. The court held that the defendants were not jointly liable and said, in dictum typical of these cases, "the difficulty in accurately estimating the separate injury done by each dog is not an argument of sufficient strength to warrant the injustice of punishing a man who is entirely innocent." *Id.* at 563.



that actually did cause the harm would not have existed without the addition of each increment.<sup>72</sup>

(b) The court may distort and expand the concert of action notion, finding such concert, and entire liability, when under accepted usage, none is present.<sup>73</sup>

Either device (a) or (b) will make each defendant liable for the whole injury leaving all the defendants to work out among themselves any matter of apportionment.

(c) The court may relax the requirements of proof as by adopting a lower standard where the amount of damage is in question rather than the fact of some damage. Some courts have expressly adopted a rule making this distinction.<sup>74</sup> Others have let the jury make the best guess they can at apportionment on whatever evidence has been made available in the case.<sup>75</sup> This last

72. *Tidal Oil v. Pease*, 153 Okla. 137, 5 P.2d 389 (1931) (pollution of separate streams running through plaintiff's pasture lands); *Johnson v. Thomas Irvine Lumber Co.*, 75 Wash. 539, 135 Pac. 217 (1913) (several independent companies permitted logs to jam in river, deflecting flow and eroding plaintiff's land). Cf. the recent case of *Micelli v. Hirsch*, 83 N.E.2d 240 (Ohio App. 1948), in which plaintiff's decedent, knocked down by a car driven by H and immediately run over by one driven by B, was then pronounced dead from his several injuries, any one of which could have caused his death. The court found no concert of action, but did find an indivisible injury, and held that joinder of B and H was proper.

It has been suggested that in Kansas entire liability will be imposed on each defendant even though the injury is a divisible one, on grounds that the action of the defendants was "concurrent". See Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 406, n.28, and 416 n.71 (1939). But the case cited by Jackson, *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706 (1894) is probably an example of the technique described here. Cf. *McDaniel v. City of Cherryvale*, 91 Kan. 40, 136 Pac. 899 (1913) (pollution of stream; concurrent wrongdoing found, but defendant saved from entire liability by statute of limitations).

73. See *Moses v. Town of Morgantown*, 192 N.C. 102, 133 S.E. 421, 423 (1926) (defendants who independently polluted same stream held jointly liable on ground that each, with knowledge of others' actions, continued his own actions, which "ipso facto creates a concert of action and makes a common design or purpose."); *Arneil v. Paterson* [1931] A.C. 560 (two dogs, one owned by defendant, killed plaintiff's sheep; defendant, who did not act in concert with other owner in any way, was held liable for the entire damage on the ground that the dogs acted in concert). That the law should require, and then be satisfied with, such methods for reaching desired conclusions is a sad commentary upon its basic premises and its formalism.

74. Cases are collected in Note, 78 A.L.R. 858 (1932); See also McCORMICK, DAMAGES 102 (1935).

75. A typical statement is the following: "In such cases since the injured party cannot supply the materials necessary to enable the jury to make an exact computation of the damages in suit, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances. . . ." *Jenkins v. Pennsylvania R. Co.*, 67 N.J.L. 331, 334, 51 Atl. 704, 705 (1902). This attitude is quite commonly adopted. *Eckman v. Lehigh & W. B. Coal Co.*, 50 Pa. Super. 427 (1912) (pollution in stream); *Inland Power & Light Co. v. Greiger*, 91 F. 2d 811 (9th Cir. 1937) (erosion of land as result of river overflow).

seems to be the usual way of handling the problem where plaintiff shows the total extent of his injury and it also appears that defendant's act merely aggravated a preexisting condition. After all this is no more a matter of guesswork than assigning a money value to pain and suffering, or to "the death alone,"<sup>76</sup> or to reputation, or an alienated affection.

(d) Where a plaintiff has shown the total amount of his damage, and that defendant's wrong has made some contribution to it, the burden of proving the extent to which this contribution fell short of the whole might be put on defendant. There are many instances which would furnish analogies close enough to support such a rule. Although the substantive law of damages shields a defendant from liability for "avoidable consequences," the burden of establishing their existence is on the defendant.<sup>77</sup> Once delivery to a bailee and his failure to redeliver are shown, the bailee has the burden of disproving the very gist of his liability—negligence.<sup>78</sup> Once the delivery of goods sold or the performance of services contracted for appears, defendant has the burden of disproving the very breach of the contract—non-payment.<sup>79</sup> The real question is not whether shifting this burden of proof would violate any formal canon of procedure, but whether it is the fair and expedient thing to do in view of defendants' generally greater access to the evidence in these situations and of the relative hardships in those cases where no evidence is forthcoming. The last means balancing the injustice of denying all redress to a man who has shown himself entitled to some, against the injustice of making a wrongdoer pay for more damage than he has caused. Eminent authorities have advocated shifting the burden of proof in this way in suits against concurrent or successive wrongdoers where the total damage caused by all is theoretically divisible.<sup>80</sup> There has as yet been scanty judicial acceptance of such a rule though the California court has recently adopted a similar one in a case where there was doubt which of two defendants caused the whole harm.<sup>81</sup> The rule may well gain wider acceptance, however, since

76. See *Kling v. Torello*, 87 Conn. 301, 306, 87 Atl. 987, 988 (1913). Cf. *Schroyer v. Bishop*, 92 Conn. 677, 682, 104 Atl. 339 (1918) ("A man's estate is entitled to some compensation for death alone without wandering into the somewhat hazy realm of an individual's expectation of life or his probable accumulations. . .").

77. McCORMICK, DAMAGES 130 (1935).

78. 8 WIGMORE, EVIDENCE § 2508 (3d ed. 1940).

79. See CLARK, CODE PLEADING 610 (2d ed. 1940). Another example in the area of contract law is the placing on the defendant of the burden of proving the excusable impossibility of his performance. See WILLISTON, CONTRACTS § 1937 (Rev. ed. 1936).

80. Wigmore, *Joint Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458 (1923); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 406 (1932); Carpenter, *Concurrent Causation*, 83 U. OF PA. L. REV. 941, 944 (1935); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 420 (1939); Note, 19 CALIF. L. REV. 630, 634 (1931). See also the discussion of *Golden v. Lerch Bros.*, *supra* note 64.

81. *Summers v. Tice*, 33 Cal. 2d 80, 199 P. 2d 1 (1948). In its opinion the California court suggested that the burden of proof on apportioning damages among concurrent or successive tortfeasors might well be put on defendants. The two problems are very

it fits well within the framework of familiar precedents and principles and reflects the modern trend to emphasize compensation of accident victims and a broad distribution of their losses rather than a more perfect tracing out of the implications of the fault principle.<sup>82</sup>

(e) Where it appears that each of several defendants has contributed to plaintiff's injury but a sufficient basis in the evidence for making an allocation among them does not appear, the courts could of course arbitrarily divide the damages among them equally or could allow the jury to do so on the basis of whatever evidence it had before it.<sup>83</sup> This result is eminently sensible but perhaps it does more violence to some elusive overtones of our Anglo-American common law tradition than a shifting of the burden of proof.

(f) Faced with this problem the court, in exercise of its equity powers, could call all the independent wrongdoers before it and apportion the damages among them as best it could. This desirable procedure is only rarely used.<sup>84</sup>

#### PROXIMATE CAUSE

We have seen how some reasonable showing of cause in fact is always a requisite of liability. But such showing may not suffice for liability. There may still be problems under the fault system and there would be even under other systems of compensation. Workman's compensation schemes, for instance, limit recovery to accidents which are regarded as incidental to the employment, and this limitation poses questions which go beyond the mere inquiry whether a given accident was the cause in fact of a specific injury, or whether this causal relation was a substantial one. Schemes to compensate victims of traffic accidents would need an analogous limitation, and so on.<sup>85</sup>

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similar to each other. See, further, Note, 47 MICH. L. REV. 1232 (1949); Micelli v. Hirsch, 83 N.E. 2d 240 (Ohio App. 1948) (discussed *supra* note 72).

82. This was the answer made long ago by the legislatures of several states in the situation that called forth some of the early decisions on this question—the worrying and killing of cattle by dogs. See *Dole v. Hardinger*, 204 Ill. App. 640 (1917); *Nelson v. Nugent*, 106 Wis. 477, 82 N.W. 287 (1900); *Remele v. Donahue*, 54 Vt. 555 (1882); *McAdams v. Sutton*, 24 Ohio St. 333 (1873); *Kerr v. O'Connor*, 63 Pa. 341 (1869); *Worcester County v. Ashworth*, 160 Mass. 186, 35 N.E. 773 (1893).

83. *Miller v. Prough*, 203 Mo. App. 413, 221 S.W. 159 (1920); *Anderson v. Halverson*, 126 Iowa 125, 101 N.W. 781 (1904); *Wood v. Snider*, 187 N.Y. 28, 79 N.E. 858 (1907) (each head of cattle could be found to have done equal damage; liability in proportion number of cattle owned by defendant bore to total number doing damage). See *Buddington v. Shearer*, 37 Mass. 477, 479 (1838).

84. One instance is found in *Mitchell Realty v. West Allis*, 184 Wis. 352, 199 N.W. 390 (1924), noted in 3 Wis. L. REV. 245 (1925) (Supreme Court, in remanding to lower court, ordered it to follow this procedure). This solution is only available when the plaintiff seeks an equitable remedy (injunction, etc.) and the court, in order to give complete relief, incidentally awards damages.

85. For limitations suggested for a proposed automobile accident compensation system, see COLUMBIA UNIVERSITY RESEARCH COUNCIL, REPORT BY COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 245 (1932); FRENCH, THE AUTOMOBILE

Our present system is not designed along any such functional lines but has traditionally focussed attention on the defendant's individual fault and the limitations on his liability bear the mark of the fault formula as we shall see.

It should be noted at this point that many courts and legal writers have stressed the fact that policy considerations underlie the doctrine of proximate cause.<sup>86</sup> Of course they do, but the policies actually involved often fail to get explicit treatment. One consideration which is common to all cases under any system is the practical need to draw the line somewhere so that liability will not crush those on whom it is put. Even under comprehensive social insurance for all vicissitudes to the body there would have to be limits on the kinds of injuries to be compensated (many kinds like worry, loss of enjoyment, prestige, etc., probably would not be), and on the amount of compensation. Under any system of more limited scope, liability is placed on individuals, groups, enterprises, and the like, rather than upon the whole of society, and there will have to be further limitations to protect these groups or individuals from being saddled with more than their fair share of the social cost of accident. Under an individualistic fault system these limitations will be geared to fault and will reflect the policy of making the extent of liability reflect the degree of fault or the factors which make conduct blameworthy. As the fact of insurance and loss distribution increasingly permeates our system and the importance of individual blameworthiness wanes, the limitations (of proximate cause, or duty, etc.) may be expected to take on more and more the character of limitations measured by what is felt to be normally incidental to the kind of activity or enterprise which is footing the bill (*e.g.* motoring, railroad transportation, the manufacture of canned foods, the owning and management of apartments, etc.).<sup>86a</sup>

Another policy consideration which pervades all the cases is the need to work out rules which are feasible to administer, and yield a workable degree of certainty.

There are other considerations which operate within a narrower sphere. Some actions and some enterprises or classes of defendants have traditionally been favored or disfavored for real or supposed considerations of policy. The

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COMPENSATION PLAN 53 *et seq.* (1933). *Cf.* questions of insurance policy coverage, where the rubric "proximate cause" is used, not as in negligence law, but to separate and define the risks or losses insured against. See Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 621, 635-6 (1950). See also *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950), in which the notion of "proximate cause" is employed to limit the liability of the United States as insurer of a ship against "all consequences of hostilities or warlike operations."

86. See, *e.g.*, Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 223, 247-9; 303, 320 (1912); Dissenting opinion, Andrews, J., in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99, 103, 59 A.L.R. 1253 (1928).

86a. This notion is ably developed in EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

same thing is true of some defenses.<sup>87</sup> The law frequently restricts or expands its handicapping processes (both substantive and procedural) to accommodate such notions. This process may be observed in the field of proximate cause as well as elsewhere.

We now turn to examine the considerations by which our law limits liability for negligent conduct even where a cause in fact relation exists. It is Dean Green's view that *all* limitations on liability other than those imposed by the cause-in-fact requirement should be administered as part of some issue other than cause.<sup>88</sup> But while this simple and helpful analysis has gained *partial* acceptance by *some* courts<sup>89</sup> (and the American Law Institute),<sup>90</sup> this acceptance has been far from complete, and the present treatment would itself be incomplete if it failed to take account of the many theories and lines of reasoning which have had some currency in the decisions.

### *The Test of Foreseeability:*

From the very beginning the notion of foreseeability has been intertwined with the development of liability for negligence. And the limitations imposed by this notion have frequently been stated in terms of proximity of cause or consequence. Thus in summing up the earlier law, Holdsworth points out that in an action on the case there must be damage, but it might be an indirect consequence of the wrong, and the courts were familiarized with the concept of negligence by the need of determining whether the damage complained of "could be said to be a sufficiently proximate consequence of the

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87. Among disfavored actions may be listed fraud, libel and slander, and malicious prosecution. Favored enterprises include governmental and charitable organizations and, in some localities, the leading industrial interests (*e.g.*, the coal mining interests in earlier Pennsylvania jurisprudence). Defenses that have been disfavored include fraud, statute of frauds, statute of limitations, truth in libel and slander, contributory negligence and dilatory pleas in general.

88. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927), discussion of cases, 77-121 and 144-68 (both inclusive). For further exposition see Green, *Are there Dependable Rules of Causation?*, 77 U. OF PA. L. REV. 601 (1929) and Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 621, 755 (1950).

89. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Kinderavitch v. Palmer*, 127 Conn. 85, 15 A.2d 83 (1940); *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767 (2d Cir. 1932); *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

90. RESTATEMENT, TORTS §§ 281, 430 (1934). In the 1948 Supplement to the Restatement, comment "e" to § 281 was expanded considerably and now accords to a much greater extent, in approach and conclusion, with Dean Green's analysis. Commenting upon the confused position of the American Law Institute, Seavey says, "Perhaps to provide a transition period in which the courts might use either approach, the Restatement of Torts, first adopting to the full the theory of risk [citing § 281], at a later stage recants and presents a confusing series of superseding causes [citing §§ 440-2]." *Mr. Justice Cardozo and the Law of Torts*, 48 YALE L.J. 398, 408 (1938). (Seavey's comments remain apposite despite changes in the 1948 supplement).

defendant's act to entail liability," a question which in turn came to be resolved "by asking whether any ordinarily prudent man would have foreseen that damage would probably result from his act."<sup>91</sup> Pollock, whose work on torts is perhaps still the leading British authority on the subject, through all his life insisted that the extent of liability for negligence was measured by what was foreseeable at the time of the act or omission complained of.<sup>92</sup> This view, however, was never accepted by all hands as a universal solvent and two leading English cases dramatically showed that liability would often be extended to entirely unforeseeable consequences.<sup>93</sup> These cases and the writings of leading commentators led to a wide acceptance of the view expressed thus by Beven: "The defendant's view of the possibilities of his act is very material to determine whether his act is negligent or not; it is utterly immaterial to limit liability when once negligence has been established."<sup>94</sup> But this view also failed of acceptance as a universal solvent, and many courts and writers, continued to bring "foreseeability" into their discussions of proximate cause. The matter cannot be left, therefore, by embracing the appealing (apparent) simplicity of either of these extreme views. Foreseeability does play a large part in limiting the extent of liability. "Attempts to escape from the significance of foresight in the field of legal remoteness are attempts to escape from our culture."<sup>95</sup> On the other hand there may be liability for unfore-

91. 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (2d ed. 1937). Later on Holdsworth says, "If we are basing liability on a negligent act, and if negligence consists in the failure to foresee results which ought reasonably to be foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results." *Id.* at 463.

92. POLLOCK, TORTS 8, 24 (14th ed. 1939). According to Pollock, "the accepted test of liability for negligence in the first instance is . . . also the proper measure of liability for the consequences of proved or admitted default." The test is whether the damage is "such as the defendant could reasonably be expected to anticipate." See Pollock, *Liability for Consequences*, 38 L.Q. REV. 165 (1922); Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449, 458 (1930); Winfield, *Restatement of the Law of Torts-Negligence*, 13 N.Y.U.L.Q. REV. 1, 3 (1935).

93. *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560 (plank negligently knocked into ship's hold caused spark at instant of impact which ignited flammable vapor present in the hold and ultimately resulted in the total destruction of the ship by fire); *Smith v. London & S.W. Ry.*, L.R. 5 C.P. 98; L.R. 6 C.P. 14 (1870) (after defendant's engine passed, fire, originating in or near dried cut-grass which defendant had negligently left along right of way, spread through a hedge bordering right of way, then two hundred yards across an adjoining stubble field, across a road, and burnt plaintiff's cottage). Goodhart, *Restatement of the Law of Torts*, 83 U. OF PA. L. REV. 963, 994, n.106 (1935) has argued that the consequences in the *Polemis* case were foreseeable. See also note 110 *infra*.

94. BEVEN, NEGLIGENCE IN LAW 89, n.2 (3d ed. 1908). See also *Smith, Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 127-8 (1912); *Christianson v. Chicago SPM & O Ry.*, 67 Minn. 94, 69 N.W. 640 (1896); *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898).

95. Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 197 (1950). See also discussion by Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 343, 354 (1924).

seeable consequences. The problem calls for further discussion which may for convenience be broken down into more or less distinct considerations:

(a) Foreseeability of damage is altogether irrelevant in determining the existence of the cause in fact relationship. Acts or omissions constantly help to bring about consequences which no man will be held to foresee. It follows that under an analysis like Dean Green's, foreseeability has no place in the issue of proximate cause. But it does not follow that such an analysis would exclude all consideration of foreseeability in determining the limits of liability, as we shall see.

(b) It is well nigh universally conceded that unreasonable likelihood (foreseeability) of harm (however tenuous or fictitious that concept may be)<sup>96</sup> is the gist of liability for negligence. This in itself, of course, is *some* limitation on liability for acts and omissions that turn out to be injurious. Just *how much* of a limitation it is depends upon how one views the scope of the duty to use care. Courts and writers have from time to time taken the position that if defendants should anticipate that certain conduct is fraught with unreasonable probability of *some* harm to *somebody*, then the duty to refrain from that conduct is owed to anyone who may in fact be hurt by it.<sup>97</sup> If such a notion is accepted, it would open up very wide possibilities indeed as to the extent of liability unless the court or jury were to consider some limiting factor (such as the source and range of harm reasonably to be anticipated from the act) in connection with the cause issue. Thus Andrews would consider the likelihood that the cause "in the usual judgment of mankind" would produce the result—whether "by the exercise of prudent foresight the result [could] be foreseen,"—as a factor in determining proximate cause.<sup>98</sup>

The view currently prevailing in this country, however, does limit the scope of the duty to do or refrain from doing a given act to (1) those persons or interests that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent.<sup>99</sup> Thus the careless pushing of a prospective train passenger was not negligence to Mrs. Palsgraf who stood many feet outside the range of probable effects of such conduct.<sup>100</sup> And carelessness in

96. For criticisms of foreseeability as a test see Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization,"* 6 U. OF CHI. L. REV. 36, 48 *et seq.* (1938); Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 755, 771-6 (1950); EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT*, 19, 58, 63 (1951).

97. Perhaps the best recent exposition of this point of view is to be found in the dissenting opinion of Andrews, J., in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 350, 162 N.E. 99, 101 (1928). See also *Smith v. London & S.W. Ry. Co.*, L.R. 5 C.P. 98, L.R. 6 C.P. 14 (1870) (particularly opinion of Kelley, C.B., 6 R. 6 C.P., at 19, 20).

98. 248 N.Y. 339, 350, 162 N.E. 99 (1928).

99. HARPER, *LAW OF TORTS* § 73 (1933); PROSSER, *TORTS* § 31 (1941); *RESTATEMENT, TORTS* § 281 (1934).

100. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

giving a gun to a young child is not negligence with respect to injury caused by dropping the gun on plaintiff's foot, since the risk of the child's dropping a fairly heavy object was not (we assume) so fraught with the chance of injury as to make the entrustment unreasonable.<sup>101</sup> It is obvious that under such an analysis of the duty problem, foreseeability is distinctly a factor which puts a considerable limitation on the extent of liability, even that it should be held to play no part whatever in determining the issue of proximate cause.<sup>102</sup> It is also clear that if this analysis of the duty problem is accepted, no good, but only confusion, can result from repeating the same inquiries as to foreseeability under the cause issue as were asked and answered (or should have been) under the duty issue. Where, however, the duty problem is analyzed in the older, less limited way, or is not clearly analyzed at all, courts tend strongly to impose pretty much the same limitations (*i.e.* those imposed by the narrower concept of duty) by importing into the issue of proximate cause a requirement of probability or foreseeability.<sup>103</sup>

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101. See Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 231 (1932); RESTATEMENT, TORTS § 281, illustration 2 (1934). See also Seavey, *Mr. Cardozo and the Law of Torts*, 48 YALE L.J. 390, 405 (1939).

102. Thus in the *Palsgraf* case the question as to foreseeability was answered in the negative (by the majority) under the duty issue, so the court was never faced with the necessity for an inquiry into the issue of proximate—or any other—cause.

It should be noted that the extent to which the notion of foreseeability will limit liability by limiting the scope of the duty owed will depend partly on how narrowly or broadly we define the risk or hazard which must be foreseen. Cf. subsection (f), *infra*.

103. *Milwaukee, &c., Ry. v. Kellogg*, 94 U.S. 469 (1876), involving the spread of a fire, caused by defendant's steamboat, to plaintiff's sawmill several hundred feet distant, has been the inspiration behind many opinions making this error. See discussion in Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 621-3 (1950).

See also the following cases in which the crucial question—the scope of defendant's duty—is by-passed and, because the results of the defendant's acts were not foreseeable, the defendant escapes liability for those results on grounds that they were not proximately caused by his acts: *Texas & Pacific Ry. Co. v. Bigham*, 90 Tex. 223, 38 S.W. 162 (1896) (plaintiff injured when cattle, frightened by train noises, burst out of defendant's stock pen through gate which had defective fastening); *Wood v. Pennsylvania R.R.*, 117 Pa. 306, 35 Atl. 699 (1896) (defendant's train struck woman at crossing and hurled body fifty feet to platform, where it struck plaintiff); *Evansville & T.H. Ry. Co. v. Welch*, 25 Ind. App. 308, 58 N.E. 88 (1900) (similar); *Uvalde Construction Co. v. Hill*, 142 Tex. 19, 175 S.W. 2d 247 (1943) (defendant's dynamite explosion half mile away frightened plaintiff's cow which trampled plaintiff's wife).

Two Illinois cases, commented upon by Green in *Illinois Negligence Law IV*, 40 ILL. L. REV. 1, 11, 12, 28 (1945) and in *Merlo v. Public Service Co.—A Study in Proximate Cause*, 37 ILL. L. REV. 429 (1943), illustrate the potential dangers inherent in this imperfect approach. See *Neering v. Illinois Central R.R.*, 383 Ill. 366, 50 N.E. 2d 497 (1943) (woman assaulted in defendant's lonely waiting room where vagrants were known to congregate; confusion, but no injustice, results from court's repetition of its inquiry into likelihood of harm under both duty and cause issues). But cf. *Merlo v. Public Service Co.*, 381 Ill. 300, 315, 45 N.E. 2d 665 (1942) (court found it negligent for defendant to allow its wires to sag and become uninsulated but that this negligence was not the cause of the death of a workman by electrocution when the boom of a crane negligently touched



Very much the same result is occasionally produced by an insistence that the causal relation be shown to exist between *that aspect of defendant's conduct which is wrongful* and the injury.<sup>104</sup> Under this approach the court asks whether the same injury would have been caused if defendant's conduct had been careful (or not violative of statute) but in all other respects had been the same as it actually was. If a speeding automobile strikes a child, could the event have been avoided by a driver who was proceeding at a reasonable speed?<sup>105</sup> If not, then the requisite causal connection does not exist. Now this is in essence the same as an inquiry into whether the accident resulted from the hazard (*viz.* lack of control) which made it negligent to drive too fast, and so fell within the scope of the duty not to speed. And it is submitted that the inquiry in the latter form is more meaningful and more likely to focus attention on the real problem involved at least in terms of the fault principle (*e.g.*, Why should one not speed? What are the peculiar risks of speeding? etc.). Moreover it is confusing to think hypothetically and hard to frame with precision the terms of a condition contrary to fact.<sup>106</sup>

Much of what has been said about the scope of common law duties is applicable also to duties imposed by statutes. Here, however, the emphasis is upon the statutory purpose in determining the interests protected by the

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the wires since "the crane operator's negligence was [not] the natural and probable consequence of the lack of insulation and the sagging wires."). Cf. *Lillie v. Thompson*, 332 U.S. 459 (in which the test of foreseeability is properly applied to the issue of duty, while the lower courts had been trapped in the quicksand of proximate cause).

104. But there are cases where causal relation exists between defendant's fault and the injury, yet where liability will not be imposed. Thus in *Gorris v. Scott*, [1874] L.R. 9 Exch. 125, defendants' wrongful failure to have pens for cattle on shipboard was the cause in fact of their being washed overboard in a heavy sea. There was no liability, however, since the statutory requirement was designed to protect the cattle only from perils from contagious disease, a hazard which was not encountered and from which their loss did not result. See Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 408 (1932).

105. Such a test was used in *Draxton v. Matzmark*, 203 Minn. 161, 280 N.W. 288 (1938); *Oster v. Chicago & A. Ry. Co.*, 256 S.W. 826 (Mo. App. 1923). A careful exposition of the test discussed in the text is to be found in Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 407 *et seq.* (1932). Carpenter believes that the case put does not yield the same result if subjected to Dean Green's analysis, *id.*, at 412, but in this his reasoning seems faulty. Green's own analysis of this particular case, however, leaves much to be desired. Green, *Are There Dependable Rules of Causation?*, 77 U. of PA. L. REV. 601, 619 (1929).

106. In the case put, for example, if defendant has been driving more slowly before the accident, he would not have been at the point of collision when the child was there, so that there would have been no accident. Does that establish causal relation between wrong and injury? Presumably not, but if not, that is because the prohibition against speed is not for the purpose of keeping people from being at a certain place at a certain time, but rather to prevent loss of control. Thus one is thrown back upon the same inquiry into the scope of duty and the purpose of the rule of conduct in order to frame intelligently the hypothesis needed for applying Carpenter's test. But why the fiction and the contortions?

duty and the evils sought to be prevented by legislative proscription of conduct, rather than upon what a reasonable person in defendant's place would foresee. Because the statutory purpose doctrine was probably clearly and expressly articulated at an earlier time than its counterpart, the limitation on the scope of common law duties, there has been perhaps slightly less urge to obfuscate the former inquiry by pursuing it in terms of proximate cause, but this is done all too often even today. Thus where plaintiff's playmate pushed him under a middle car of defendant's train which was passing at a speed in violation of a local ordinance, the court admitted that the defendant was guilty of negligence *per se* but found that the "intervening, independent, sole, proximate cause" of the injury was the other boy's push.<sup>107</sup> And where defendant has parked his unlocked car on the street, with the key in the ignition switch in violation of an ordinance, and the car is stolen by a person who, while driving it, causes some damage, the owner has been held not liable on the ground that the proximate cause of the injury was the action of the thief and not the negligence of the owner.<sup>108</sup>

(c) There is one kind of problem to which Pollock's test limiting proximate consequences to those which are foreseeable will yield a different answer from that given by the great weight of authority in this country and England. There are cases where defendant has been negligent towards plaintiff or his property (even under the restrictive view of the scope of duty) and where injury has come through the very hazard that made the conduct negligent, but where because the stage is set for it the *extent* of the injury passes all bounds of reasonable anticipation. A milkman, for instance, negligently leaves a bottle with a chipped lip and this scratches a housewife's hand as she takes it in. All this is easily within the range of foresight. This particular housewife, however, has a blood condition so that what to most women would be a trivial scratch leads to blood poisoning and death.<sup>109</sup> Or a careless stevedore drops a plank from hoisting tackle into the hold of a vessel. This might well have damaged a member of the crew, or the ship, or cargo, but the plank happens to ignite a spark which in turn ignites petrol vapor in the hold and

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107. *Lineberry v. North Carolina Ry. Co.*, 187 N.C. 786, 123 S.E. 1 (1924). Green suggests that courts often use the 'proximate cause' doctrine "to get rid of the compulsion of the statute." See Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 621, 634-5, 764, 771 (1950); and Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B. J. 24, 28-30 (1950). Cf. James, *Statutory Standards & Negligence in Accident Cases*, 11 LA. L. REV. 95, 121 (1950).

108. See, e.g., *Wannebo v. Gates*, 34 N.W. 2d 695 (Minn. 1948) and Note, 14 MO. L. REV. 128 (1949), which make the error pointed out in the text. Cases are collected in Annotations in 26 A.L.R. 912 (1923) and 158 A.L.R. 1374 (1945). Perhaps the leading recent case *contra* is *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944). See also Note, 34 IOWA L. REV. 376 (1949), which treats this problem and properly distinguishes the issues of cause and of duty.

109. *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926).

leads to total destruction of the ship and cargo.<sup>110</sup> In these and like cases the courts generally hold defendant liable for the full extent of the injury without regard to foreseeability.<sup>111</sup>

This result has been attacked as one quite inconsistent with the prevailing limitation on the scope of duty to interests and hazards which are foreseeable. "[If] we once reject the idea that an act has a general quality of wrongfulness where different persons are concerned, it would seem to follow logically that we must also reject the idea that an act has a general quality of wrongfulness where different consequences are concerned."<sup>112</sup> But the criticism stems from too much insistence on mechanical consistency. There is no reason to apply the restrictive foreseeability test to all problems just because it is applied to some. There are strong reasons, both within the framework of fault and to secure more effective compensation, for holding a wrongdoer liable for all injuries he causes innocent men, and rejecting the foreseeability limitation altogether.<sup>112a</sup> Counter considerations have prevailed to limit the risks of negligent conduct as to persons (or interests) and types of hazard. Why should not that much of a concession to one group of competing considerations be thought enough? The choice is between emphasizing, on the one hand, the limited and inconsequential nature of the fault, and on the other the very wide and serious nature of the damage that calls for compensation. Is it not one of the judicial functions to make a practical compromise where policies conflict? At any rate here the line is drawn in fact and any deviation from it is not likely to be in the direction of ruling out unforeseeable consequences of the kind being discussed.<sup>113</sup> It should be noted that what is said under the present head applies

110. *In re Polemis & Furness, Withy Co.*, [1921] 3 K.B. 560. Seavey suggests that the foreseeability of *some* harm may explain this "famous but doubtful decision." Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 YALE L.J. 390, 403 (1939).

111. See authorities cited in notes 67-69 *supra*; and discussion by Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 477-484 (1932). These cases should not be confused with those where the extraordinary result was produced by an *intervening* cause. See *infra* at pages 792-96.

112. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J., 449, 465 (1930).

112a. In terms of fault it may be contended that any foreseeability limitation would deprive an *innocent* victim of recovery for some damages caused in fact by a wrongdoer. And obviously such a limitation shuts off compensation for some of the damages actually suffered. Both of these consequences are unfortunate and must be counted as *costs* of a foreseeability rule. In those fields of accident law where liability tends in practice to *distribute* (rather than merely to *shift*) losses, the refusal to afford compensation for actual damage is even more unfortunate. See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); James & Dickinson, *Accident Proneness & Accident Law*, 63 HARV. L. REV. 769, 777 *et seq.* (1950).

113. With regard to liability for unforeseeable consequences of what Prosser calls "an impact upon the person of the plaintiff" (TORTS 344 (1941)), compare the suggestion by Burke, *Rules of Legal Cause in Negligence*, 15 CALIF. L. REV. 1, 14 (1926) that a distinction be made between cases in which "the first impingement of the defendant's wrong" was unforeseeable (and liability would therefore not be imposed) and cases

only where preexisting conditions and causes have already laid the train for the surprisingly great extent of the damage which defendant's act sets off.

(d) Where there are forces intervening between defendant's act and plaintiff's injury courts generally tend to invoke the test of foreseeability. To the eye of philosophy the distinction between intervening and preexisting causes or conditions is tenuous if it exists at all. The philosophic determinist would see no essential distinction between the gasoline vapor already in the hold of the good ship *Thrasyvoulos* before the ill-starred stevedore dropped the plank, and the hurricane or flood that arose *after* defendant's negligence left plaintiff's property vulnerably exposed to such a hazard, or for that matter the malpractice of the surgeon which caused gangrene to set in in plaintiff's wound. To the determinist the stage for all these things was irrevocably set long before any time that matters in this discussion. Of course the law generally—certainly the law of fault—does not accept any such philosophy.<sup>114</sup> But even those who reject determinism can see that a wind or storm or flood was often inevitably in the making before defendant's negligence took place, though it appeared on the immediate scene thereafter. Yet even such considerations are generally too refined for the law's rough-hewn tests. By and large external forces will be regarded as intervening if they appear on the scene after defendant had acted unless perhaps their pending inevitability at the time of defendant's negligent act or omission is made crystal clear.<sup>115</sup> And when a new force (for which defendant is not responsible) "intervenes" in this crude sense to bring about a result that defendant's negligence would not otherwise have produced, defendant is generally held for that result only where the intervening force was foreseeable.<sup>116</sup> As many cases put it, a new and unfore-

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in which unforeseeable consequences followed a foreseeable "impingement" (and liability would be imposed for the full damage suffered). This is perhaps only a rewording of the generally accepted rule.

114. "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." POLLOCK, *TORTS* 36 (11th ed. 1920).

115. The definition offered by McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 159 (1925) is clear and comprehensive: "An intervening force is a force which is neither operating in the defendant's presence, nor at the place where the defendant's act takes effect at the time of the defendant's act, but comes into effective operation at or before the time of the damage." Cf. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 476 (1932).

116. This result was reached in *Payne v. City of N.Y.*, 277 N.Y. 393, 14 N.E.2d 449 (1938) (cobblestone left lying in street thrown by wheel of passing car through windshield of another car); *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 149 Ore. 126, 40 P.2d 703 (1935) (fire carried by wind for several miles); *Pease v. Sinclair Ref. Co.*, 104 F.2d 183 (1939) (mislabelled chemical mixed with another chemical caused explosion which would not have resulted had contents and container been properly matched); *Royal Indemnity Co. v. Midland Counties Pub. Ser. Corp.*, 42 Cal. App. 628, 183 Pac. 960 (1919) (horse entangled improperly insulated guy wire); *Mize v. Rocky Mtn. Bell Telephone Co.*, 38 Mont. 521, 100 Pac. 971 (1909) (telephone wire, negligently allowed to break and fall across uninsulated power wire, received a charge of electricity

seeable force breaks the causal chain. A better analysis is to regard the intervening force as a risk or hazard and to ask whether its foreseeability was such as to make defendant's act negligent with regard to it. It is better, in other words, to inquire whether defendant's duty extends to such a risk as the intervening force, because the question in this form focuses attention on a more significant and less fictitious problem than that of cause.<sup>117</sup> But the result is likely to be the same. As we have seen there is probably some modern trend towards greater use of the duty analysis but this is perhaps more observable

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from the power wire which it carried ten miles to a wire fence which became charged and electrocuted plaintiff's intestate when he touched it). Cf. *Elder v. Lykens Vallen Coal Co.*, 157 Pa. 490, 27 Atl. 545 (1893) (owner of mine depositing culm in stream where ordinary current will carry it down to plaintiff's land is not relieved of liability to plaintiff when the deposit in fact results from an extraordinary and unforeseeable flood)

A word about "exceptions" to this general rule (*i.e.*, cases in which a defendant is held liable for the consequences of an unforeseeable intervening force). Where a carrier has been guilty of negligent delay in transporting goods, and while en route they are destroyed by an act of God, some states hold the carrier liable. *Bibb Broom Corn Co. v. Atchison, etc., R. Co.*, 94 Minn. 269, 102 N.W. 709 (1905); *Green-Wheeler Shoe Co. v. Chicago, etc., R. Co.*, 130 Iowa 123, 106 N.W. 498 (1906); *Plotz v. Miller*, 21 Ky. L. Rep. 257, 51 S.W. 176 (1899); *Sunderland Bros. v. Chicago, etc. R. Co.*, 89 Neb. 660, 131 N.W. 1047 (1911); *Read v. Spaulding*, 30 N.Y. 630, 86 Am. Dec. 426 (1864). Cf. *Chicago, etc., R. Co. v. Miles*, 92 Ark. 573, 123 S.W. 775, 124 S.W. 1043 (1909). It should be noted, however, that in many of the cases often cited for this "exception" the courts have justified the imposition of liability on the ground that it was foreseeable that the delay would increase the likelihood of some casualty overtaking the goods. But, that the hazard was not foreseeable, see Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 51 (1937), discussing the *Bibb Broom* case. Cases are collected in a note, 46 A.L.R. 302 (1927).

Carpenter lists several "exceptions where proximate cause exists although the consequences result from unforeseeable intervening causes". *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 521-39 (1932). But in most, if not all, of these "exceptions" the injuries resulting from the intervention of the new forces were not altogether unforeseeable. Cf., for instance, Carpenter, *Proximate Cause*, 14 So. CALIF. L. REV. 416, 440 (1941); and note 125, *infra*. The position of the Restatement of Torts with respect to some of Carpenter's classes of intervening forces may be found in §§ 443 and 444 (responses of animals and/or humans), § 445 (acts to avert threatened danger), § 446 (acts to prevent deprivation of rights), and § 455 (acts of insane victim).

117. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 510 (1932) singles out one class of cases (ejection by carriers of drunk persons from their conveyances) where the courts occasionally do (and always should) talk in terms of the scope of the defendant's duty, rather than in terms of the closeness of the causal relation between the carrier's wrong and the injury suffered. He immediately proceeds, however, to discuss in terms of cause another group of cases wherein the duty analysis would make the problem much clearer. *Id.* at 510-12. This latter group includes *Victory Sparkler & Specialty Co. v. Price*, 146 Miss. 192, 111 So. 437, 50 A.L.R. 1462 (1927) (child died from effects of eating fireworks; manufacturer not liable) and *Central Georgia Ry. v. Price*, 106 Ga. 176, 32 S.E. 77 (1898) (railroad not liable when passenger, who had been lodged in hotel by railroad after it negligently carried her past her destination was injured by explosion of lamp negligently furnished by hotel proprietor).

when the new force intervenes between defendant's act and any injury at all to plaintiff than when the new force aggravates the extent of injuries concededly caused by defendant's negligence,<sup>118</sup> though as a theoretical matter it might be pretty hard to defend such a distinction.

(e) Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences; otherwise he will generally not be.<sup>119</sup> Here, however, when voluntary acts of *legally responsible*

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118. Compare *Johnson v. Shattuck*, 125 Conn. 60, 3 A.2d 229 (1938) (bicycle on which plaintiff was "passenger" turned into path of defendant's automobile; court finds that the foreseeability of the hazard of such a turn made defendant's conduct negligent) with *Wright v. Blakeslee*, 102 Conn. 162, 128 Atl. 113 (1925) (injury resulting from defendant's negligence aggravated by doctor's negligence; court finds damage attributable to doctor's acts to have "proximately result[ed]" from the original negligence).<sup>o</sup> And cf. *Mahoney v. Beatman*, 110 Conn. 184, 147 Atl. 762, 66 A.L.R. 1121 (1929).

119. Examples could be multiplied infinitely, for there are thousands of reported cases involving intervening human forces. As illustrative of their great variety see *RESTATEMENT, TORTS* § 449 (1934) and illustrations, and: *Byrne v. Wilson*, 15 Ir. C.L. R. 332 (1862) (owner of bus which was negligently driven into canal lock liable for death of passenger who drowned when lock-keeper let water into the lock); *Clark v. Chambers*, [1878] 3 Q.B.D. 327 (defendant, who had wrongfully barred a private driveway with a spiked pole which was later moved by an unknown third person to an adjacent footpath is liable to plaintiff lawfully using footpath who is injured by a spike on the pole); *Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S.E. 395 (1902) (railroad liable for death of passenger thrown from its car by a negligent jolt and killed while lying unconscious on the tracks by train of another company); *Brauer v. N.Y. Cent. & H. R.R. Co.*, 91 N.J.L. 190, 103 Atl. 166 (1918) (railroad which struck plaintiff's wagon at grade crossing liable also for loss of goods, which wagon was carrying, stolen by people at scene of accident); *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (E.D. Mich. 1918) (manufacturer who sold loaded air rifle to wholesaler, who sold it to retailer, liable to retailer's clerk shot in eye when prospective customer pulled trigger); *Shafer v. Keeley Ice Cream Co.*, 65 Utah 46, 234 Pac. 300 (1925) (float sponsored by defendant in parade drew large disorderly crowd which knocked down and injured plaintiff); *Serviss v. Cloud*, 121 Kan. 251, 246 Pac. 509 (1926) (operator of stone quarry liable for death of boy as result of explosion of gunpowder he found in open, unguarded cans in quarry); *Mills v. Central of Georgia Ry. Co.*, 140 Ga. 181, 78 S.E. 816 (1913) (similar, as to explosive signalling torpedo negligently left on track by defendant and picked up by boy who exploded it, fatally injuring his brother); and as to explosives left accessible to children, see Note, 48 MICH. L. REV. 374 (1950) (reviewing New York cases), and annotations, 43 A.L.R. 434 (1926); 49 A.L.R. 160 (1927); 100 A.L.R. 451 (1936).

Cf. *Robinson v. Butler*, 226 Minn. 491, 33 N.W. 2d 821 (1948) (driver of car attempting to pass plaintiff's car not liable for injuries to plaintiff occurring when frightened passenger in plaintiff's car grabbed steering wheel and caused car to veer off left side of road; court, stressing *RESTATEMENT* § 442, finds the passenger's act to be unforeseeable and extraordinary); *Glassey v. Worcester Consol. St. Ry. Co.*, 185 Mass.

persons are concerned other factors besides foreseeability sometimes come into the picture as we shall see.<sup>120</sup>

So far as scope of duty (or as some courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent<sup>121</sup> or intentional or criminal.<sup>122</sup> Even criminal conduct by others is often reasonably to be anticipated. After all, if I leave a borrowed car on the streets of New York or Chicago with doors unlocked and key in ignition, I am negligent (at least towards the owner) because of the very likelihood of theft.<sup>123</sup> And if I lend a car to one known by me to be habitually careless I am negligent precisely because of the likelihood of his negligent operation of my car.<sup>124</sup> Again the importance of the factor of foreseeability

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315, 70 N.E. 199 (1904) (railway not liable for acts of several boys in taking large, empty wire reel from side of highway and rolling it down highway to where it hit plaintiff's carriage and injured plaintiff).

120. See text *infra* at note 163.

121. RESTATEMENT, TORTS § 447 (1934). See also *Herman v. Markham Air Rifle Co.*, *supra* note 119; *Teasdale v. Beacon Oil Co.*, 266 Mass. 25, 164 N.E. 612 (1929) (defendant liable for negligence of its filling station attendant who spilled gas on a car and on plaintiff even though car owner was negligent in then cranking his car with coil box uncovered, thus setting fire to the spilled gas); *Cannon v. Lockhart Mills*, 101 S.C. 59, 85 S.E. 233 (1915) (employer repairing water closet used by employees not relieved of liability to employee, who fell through hole in closet floor, for failure to fasten door properly, even though stick employer had used for this purpose had been carelessly thrown aside by plaintiff's fellow-employee just before plaintiff's mishap).

122. RESTATEMENT, TORTS § 448 (1934). Illustrating the liability of the original wrongdoer for foreseeable intervening intentional acts are *Clark v. Chambers*, *supra* note 119; *Illidge v. Goodwin*, 5 Car. & P. 190, 172 Eng. Rep. 934 (1831) (defendant would be liable for damage done when his horse, negligently left in the street, backed into a shop window, even though the horse did not move until a third person slapped it or the shop owner "laid hold of its head"); *Pearl v. Macauley*, 6 App. Div. 70, 39 N.Y. Supp. 472 (2d Dep't 1896) (defendant's horse, negligently left unattended on street, ran into and injured plaintiff when hit by rocks thrown at it by boys using slings).

With regard to intervening criminal acts see *Brauer v. N.Y. Cent. & H.R.R. Co.*, *supra* note 119; *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921) (railroad which negligently carried passenger past her destination and forced her to leave train at notoriously dangerous neighborhood would be liable if she were raped while walking home; plaintiff's judgment reversed on other grounds); *McDonald v. Central School District*, 289 N.Y. 800, 47 N.E. 2d 50 (1943) (liability for failure to anticipate that motorist might pass standing school bus); and see Note, 24 MINN. L. REV. 666 (1940). See cases collected in Note, 78 A.L.R. 471 (1932).

123. It is generally held that the bailee on a "loan" of goods (*i.e.*, a bailment "for the bailee's sole benefit") is under a duty to exercise the greatest care. DOBIE, BAILMENTS 34 (1914). The situation detailed in the text would certainly not be consistent with the performance of this strict duty.

For cases in which the owner of a car, who has left it with the key in the ignition switch, is being sued for damage inflicted by a thief who has driven it off, see note 108 *supra*, and *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E. 2d 537 (1948) (reviewing the cases).

124. *Cf. Mitchell v. Churches*, 119 Wash. 547, 206 Pac. 6 (1922), 36 HARV. L. REV. 110 (1922) (defendant loaned his car to one he knew would probably drive when intoxicated).

is not altered if the intervening act is that of plaintiff himself,<sup>125</sup> nor is it if that act is a negligent one. When I lent my car to the careless driver, one of the risks that made me negligent was surely the chance that he might hurt himself. If he is barred from recovery for such a hurt it is because of his contributory fault, not for want of a causal connection or because he is beyond the scope of my duty.<sup>126</sup> One other point should be noted here. There are cases where defendant's wrong would not have caused plaintiff's injury if some third person had taken intervening precautions which he was legally bound to take. In such a case it might be said that the third person's negligent omission intervened between defendant's wrong and the injury. Where that is the case foreseeability is less likely to be used as a test of exclusion of the original defendant's liability than where an affirmative act intervenes.<sup>127</sup>

125. See *Serviss v. Cloud*, *supra* note 119; *Greenwood v. Jack*, 175 Minn. 216, 220 N.W. 565 (1928) (defendant made defective repairs on plaintiff's car, so that when plaintiff cranked it it backfired and broke his arm); *Judy v. Doyle*, 130 Va. 392, 108 S.E. 6 (1921) (owner of truck who parked it so that sharp blades it was carrying projected out into the street liable to boy on bicycle who rode against them).

Where defendant's act threatens harm to the life or property of another, and a person injures himself or another in acting to avert this harm, the original wrongdoer will be liable for this latter damage. RESTATEMENT, TORTS § 445 (1934); and see discussion of cases by Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 527-530 (1932) (injuries suffered by person attempting to extricate himself from a situation which threatens harm because of defendant's negligence); and *id.* at 535, nn. 424 and 425 (damage done to himself or to others by an intervenor who is attempting to rescue other persons or property from peril created by the defendant); Notes, 19 A.L.R. 4 (1922); 64 A.L.R. 515 (1929). The "rescue" doctrine applies though neither human life nor the rescuer's own property are in peril as a result of defendant's acts. See A.L.R. notes, cited *supra*, and *Rushton v. Howle*, 53 S.E.2d 768 (Ga. 1949).

It has been suggested that these cases involve an "abandonment of the rule of foreseeability." Note, 29 COL. L. REV. 53, 58 (1929), but the authors agree with Cardozo, J., that "danger invites rescue." *Wagner v. International R. Co.*, 232 N.Y. 176, 180, 133 N.E. 437 (1921), and that the foreseeability of the rescue attempt brings the rescuer within the scope of the defendant's duty.

126. See *Nehrbass v. Home Indemnity Co.*, 37 F. Supp. 123 (D. La. 1941).

127. In the majority of cases the original wrongdoer is held liable for the ultimate consequences of his act even though some third person, by performing his duty, might have prevented these consequences. See *Bisby v. Thurber*, 80 N.H. 411, 118 Atl. 99 (1922) (landlord of premises with roof and gutters so situated that rainwater flows onto sidewalk and freezes is liable to person injured in fall on that ice notwithstanding that tenant failed to observe covenant to repair); *Wiley v. West Jersey R.R.*, 44 N.J.L. 247 (1882) (defendant liable for consequences of fire negligently caused by sparks from its locomotive despite showing that tenant on whose land fire started had his attention called to the fire and was under a duty to extinguish it); *Sider v. General Electric Co.*, 203 App. Div. 443, 197 N.Y. Supp. 98 (4th Dep't 1922) (manufacturer liable for placing packing blocks, which caused short circuit, in transformer, although purchaser also was negligent in putting transformer into operation without first inspecting it and testing it). See also RESTATEMENT, TORTS § 452 (1934).

If a third person does attempt, but fails, to halt the consequences of the defendant's act, the unsuccessful intervention does not relieve the defendant of liability. *Mathis v.*



(f) Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. Upon this all are agreed, whether they regard foreseeability as relevant only to the duty issue, or to questions of proximate cause as well. "[W]hen it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not avail him to say that he could not foresee the precise course or the full extent of the consequences, being of that kind, which in fact happened."<sup>128</sup> In *Hill v. Winsor*,<sup>129</sup> the defendants while operating their tug in a negligent manner, bumped the fender of a bridge on which plaintiff was at work causing the braces between certain piles to fall so that the piles sprang together, catching plaintiff between them to his injury. The accident was a most unusual one in the manner of its occurrence, yet the plaintiff was obviously put in danger by the tug's negligence and the risk of his being struck by the tug itself or injured somehow by the blow of the vessel against the structure

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Granger Brick & Tile Co., 85 Wash. 634, 149 Pac. 3 (1915) (caps); *Clark v. E.I. DuPont de N.P. Co.*, 94 Kan. 268, 146 Pac. 320 (1915) (high explosive); *Henningsen v. Markowitz*, 132 Misc. 547, 230 N.Y. Supp. 313 (Sup. Ct. 1928) (air rifle); cf. *Haverly v. St. Line & S.R. Co.*, 135 Pa. 50, 19 Atl. 1013 (1890) (fire negligently caused by defendant and not entirely extinguished by plaintiff's agent). The same rule applies even though it is the defendant himself who intervenes after he has created the risk and attempts, by reasonable means, to prevent it from taking effect: he will be liable for his original wrong in creating the risk unless he is entirely successful in eliminating it. RESTATEMENT, TORTS § 437 (1934).

There are some cases, however,—most of them are fairly old—which do exonerate a defendant from liability for a consequence which another should have prevented. *Carter v. Towne*, 103 Mass. 507 (1870) (defendant not liable to nine year old boy who burned himself with dynamite he bought from defendant since boy's parents knew he had bought the explosive and although they took it away from him they gave some of it back to him on a previous occasion and had kept the remainder of it in a place where he was able to obtain it at any time); *Fowles v. Briggs*, 116 Mich. 425, 74 N.W. 1046, 40 L.R.A. 528, 72 Am. St. Rep. 537 (1898) (defendant company which loaded its lumber on a flat car and delivered the car to a railroad which failed in its duty to inspect the load not liable to railroad worker killed when load shifted on the car); *Kurtz v. Detroit, T. & I.R. Co.*, 238 Mich. 239, 213 N.W. 169 (1927) (similar); *Howard v. Redden*, 93 Conn. 604, 107 Atl. 509, 7 A.L.R. 198 (1919) (building contractor not liable to passer-by killed by fall of weathered and rusted cornice because of passage of some years since building completed and owner's supervening negligent failure to inspect the premises).

128. Pollock, *Liability for Consequences*, 38 L. Q. REV. 165, 167 (1922). RESTATEMENT, TORTS § 435 (1934) is in agreement.

The position stated here (which is pretty generally accepted) should not be confused with the theory treated in the text at notes 97-98 *supra* (which is *not* generally accepted). The theory suggested at notes 97-98 does not limit the scope of duty to the class of persons or the type of risks reasonably to be foreseen—and it therefore may require the imposition of liability for injuries to unforeseeable victims from unforeseeable hazards. On the other hand the rule here under discussion does recognize this limitation of the scope of duty owed, and requires only that a broad view be taken of the class of risks or victims to be foreseen.

129. 118 Mass. 251 (1875).

on which he was working were among the risks that made the operation of the tug negligent. So defendant was held though probably no one could have anticipated the actual train of events. The hazard, in other words, was not defined narrowly as a risk that the piles would spring together when a blow caused the braces between them to fall.<sup>130</sup> On the other hand the risk or hazard to be perceived and guarded against cannot be defined too vaguely, or the present restriction would lose all meaning and every defendant whose acts were a cause in fact would be liable.

The example of the speeding car striking the child will illustrate this. If the rule against excessive speed be viewed as simply designed to prevent automobile accidents or the striking of pedestrians, collision will be seen to have arisen out of the breach of duty if a reasonable speed would not have brought the car to the point of collision when the child was there. Yet if the child darted out from behind a tree on a lonely road immediately in front of defendant's automobile so that the accident would have been unavoidable *then* even if defendant had been proceeding at a reasonable rate, most courts will not hold him.<sup>131</sup> The hazards peculiar to speed are those involved in dimin-

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130. Other cases in which liability has been imposed as a result of the broad view the court has taken of the class of risks or victims to be foreseen include: *Figlar v. Gordon*, 133 Conn. 577, 53 A. 2d 645 (1947) (bus company liable for negligence of driver who raced motor of stationary bus, frightening pedestrian in front of bus, and causing her to hurry into path of car illegally passing alongside of the bus); *Osborne v. Van Dyke*, 113 Iowa 558, 85 N.W. 784 (1901) (defendant, beating horse with stick, liable to plaintiff whom he hit in the nose when his foot slipped); *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31 (1890) (defendant's railroad trackage, forming arc of circle, was intersected twice within short distance by straight track of another railroad; defendant's engine negligently ran into engine of other railroad at one crossing, was thrown into reverse by the impact, went around the arc and smashed into another part of the same train of other railroad at other crossing; defendant liable to passenger of other railroad injured by second impact); *Gibson v. Garcia*, 216 P.2d 119 (Cal. App. 1950) (transit company, maintaining defective pole along highway liable to pedestrian injured when pole, struck by negligent motorist, fell on her); and see 65 C.J.S. 670 (Negligence § 109(b), which cites pertinent cases in notes to the first paragraph, but which makes the error examined *supra*, at notes 99 and 103, in confusing the negligence (duty) issue with the cause issue with respect to application of the foreseeability concept).

Carpenter does not place as much stress as do the authors here upon the "duty" approach to the problem of defendant's liability. Consequently he sees cases like those just discussed as presenting no question of the foreseeability of the consequences but rather as requiring the imposition of liability because there are no independent intervening forces and causation is "direct". See *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 473-475 (1932) and *Proximate Cause*, 14 So. CALIF. L. REV. 416, 435-438 (1941). For an excellent criticism of the "directness" test see Seavey, *Mr. Cardozo and the Law of Torts*, 48 YALE L.J. 390, 407 (1939). See also text, *infra*, at note 156.

131. See *Howk v. Anderson*, 218 Iowa 358, 253 N.W. 32 (1934); *Burly v. Stephens*, 113 Wash. 182, 193 Pac. 684 (1920). See *Wallace v. Suburban Ry. Co.*, 26 Ore. 174, 177, 37 Pac. 477, 478 (1894) ("If we assume . . . that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial . . ."). Cf. note 105, *supra*.

ished control of the vehicle. The inquiry then into the nature of the risks or hazards the foreseeability of which makes conduct negligent must be neither too refined nor too coarse.

It is a matter of judgment in drawing the line. It is often not enough to ask whether the rule of conduct violated is one to prevent traumatic bodily injury, or the like; the nature of the hazards peculiar to the proscribed conduct must be sought. But these must not be described in too specific and detailed a way—it is enough that their general nature be indicated, and this will vary from situation to situation. While it is negligent to speed on an ordinary highway because of the risk of bringing about injury through diminished control, it might be negligent to drive a car in some places crowded with pedestrians at any speed or under any practicable degree of control because of the likelihood of striking someone in any manner at all.<sup>132</sup> The inquiry is but an aspect of that made under the issue of negligence (which includes the sub-issues of standard of conduct, scope of duty, and breach): was defendant's conduct negligent in the light of all the risks to be foreseen by the eye of prudence under the circumstances? For that reason it is futile and confusing to repeat the inquiry under the heading of cause.

(g) Foreseeability is to be determined in the light of what a reasonable man would have foreseen and is not limited to what defendant did in fact foresee, though it includes that.<sup>133</sup>

(h) Foreseeability is not a term of precision, and there will not be anything like uniformity in judgments of what is reasonably "within the risk" foreseeably created by defendant's negligence. The decision—whether made by court or jury—will often depend upon which circumstances in the case are selected for emphasis. "It all depends upon what factors in the evidence a court is willing to isolate and emphasize for the purpose of making this

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The same principle applies in defining the scope of the plaintiff's duty. *Berry v. Sugar Notch*, 191 Pa. 345, 43 Atl. 240 (1899) (driver of trolley injured by tree which fell on his car as it was moving not barred by own contributory negligence even though speed of car was "considerably in excess" of the legal limit; quite clearly the rule against excessive speed was not meant to guard against *all* accidents of every sort—the court recognizes that if the tree had already fallen and plaintiff's high rate of speed had made it impossible for him to stop before striking it a different situation would be presented and plaintiff might well be guilty of contributory negligence).

132. Cf. RESTATEMENT, TORTS § 468, comment b (1934): "There are many acts and omissions which are negligent because of their generally dangerous character and not because of their tendency to create any particular hazard or hazards." Cited with approval in *Hinch v. Elliott*, 119 Conn. 207, 210, 175 Atl. 684 (1934). In the 1948 supplement to the restatement this comment is deleted in order that § 468 might conform to the changed analysis of the hazard problem in § 281, comment e. But in noting his reasons for the changes in § 281, comment e, the reporter recognized that some conduct may be of a "generally dangerous character."

133. James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. REV. 1, 5-15 (1951).

decision, which process in turn depends pretty much on what outcome the court wishes to achieve or thinks to be politic. This factor in the judgment process, in turn, is not usually a matter of conscious choice but may be a function of the judge's accumulated experience in and observations of the world he lives in."<sup>134</sup> It may also depend on what formula is chosen. In many cases, from the point of view of one in the actor's shoes at the time of the act or omission complained of, neither the exact chain of consequences nor their precise nature and extent were probably to be actually anticipated. But in these same cases if it is asked whether such occurrences and consequences would have seemed extraordinary and out of the range of probability if they had then been called to the actor's attention, they will often appear to be more foreseeable. The formula chosen by the Restatement in its sections on proximate cause, with its emphasis on what seems "extraordinary" in the light of hindsight seems to abandon the foreseeability test.<sup>135</sup> But careful analysis shows that it has not. "When we have hindsight nothing is extraordinary, for we can see each step following inevitably on the other; when, after an event, we say 'What a highly extraordinary result', we mean that a person before the event could not have expected it."<sup>136</sup> The proposed test

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134. Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization"*, 6 U. OF CHI. L. REV. 36, 50 (1938). As Prosser points out, this difficulty is greater when it is asked whether a particular consequence is foreseeable enough to be "within the risk", than when the inquiry is simply whether the aggregate of foreseeable consequences is enough to make a given act or omission negligent. PROSSER, TORTS 343 (1941).

As a matter of trial technique it is recommended that on the plaintiff's side of the case the facts be described as generally as is practicable, with the goal in mind of persuading court and jury that the unusual, freakish features of the case are unimportant and that the "significant" hazards (the ones which counsel has stressed) that were actually encountered were really quite foreseeable by any reasonable defendant. Of course defense counsel will stress the unusual details of the accident, which will in large measure be unforeseeable, in the hope that a sufficiently particularized view of the hazards to be foreseen will be taken by the triers of fact. This point is ably made by Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 193, 198 (1950).

In interpreting duties imposed by statutes as broadly and generally as possible in terms of hazards to be anticipated the courts are, of course, formulating doctrines which are enormously favorable to plaintiffs. See, e.g., the discussion in Note, 34 IOWA L. REV. 376 (1949), of cases in which the car owner, who has violated a statute by leaving his car unlocked with the keys in the ignition switch, is being sued for injuries a thief has caused while driving the car after stealing it. And see James, *Statutory Standards & Negligence in Accident Cases*, 11 LA. L. REV. 95, 100, 113 (1950).

135. RESTATEMENT, TORTS § 433(b) and comment e (1934). Statements of this rule in the cases seem even plainer in their rejection of "foreseeability" as a test. See *Butts v. Anthis*, 181 Okla. 276, 73 P.2d 843, 845 (1937) ("all the consequences which a prudent and experienced man, fully acquainted with all the facts and circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind." Emphasis supplied).

136. Goodhart, *The Restatement of the Law of Torts, II*, 83 U. OF PA. L. REV. 968, 994 (1935).

probably does, however, amount to an invitation to take a broad view towards what is foreseeable. The same is probably true of the use of the word "normal" (rather than foreseeable, or probable) as the opposite of extraordinary. It is too bad that this formula was not used in defining the negligence issue where such considerations more appropriately belong.<sup>137</sup>

(i) The limitation of liability to consequences foreseeably "within the risk" (with the exceptions noted above) is probably well enough adapted to an accident law in transition from one based on fault to one affording compensation without regard to fault. This is so partly because it is vague and imprecise enough to allow courts and juries a good deal of elasticity in responding to trends which are only half articulated, without putting too much strain on the logical framework. This elasticity also accommodates the fact that the range of foreseeability may grow with increase of knowledge about human behavior and about the propensities of animate and inanimate things (including machines, atoms, and microbes).<sup>138</sup> But beyond all this, if the importance of fault continues to wane, the test will lend itself readily to becoming a rational one under the new dispensation—the inquiry whether the consequence is within the risk incident to the particular act or omission which is claimed to be negligent, may gradually be transformed into the question whether it is within a risk incident to the enterprise or activity which is to be charged for compensating it.<sup>138a</sup>

#### *Other Proposed Tests:*

There is a variety of other tests of the defendant's liability which have had more or less currency and which find occasional favor today. Some of these are more, and others less, restrictive than the prevailing modified foreseeability or risk test. Still others would substitute a formula which, after inviting inquiry along one or more false scents, comes down in the last analysis to nothing more than the foreseeability test.

I. Courts have infrequently confined liability within arbitrary limits of time or space, restricting it far more than would a test in terms of foreseeability or risk. Thus the New York courts,<sup>139</sup> and formerly those of Penn-

137. Cf. Seavey, *Mr. Cardozo and the Law of Torts*, 48 YALE L.J. 390, 408 (1939), quoted *supra*, note 90.

138. Cf. *McPartland v. State*, 277 App. Div. 103, 98 N.Y.S.2d 665, 668 (1950), where the point is made that if tort liability has been broadened it has not been from any relaxation of standards of fault but has been the result of a change in "the range and scope of the danger to be guarded against. The law of tort is more 'liberal' precisely because experience shows more predictable casualties."

138a. Cf. The able and provocative development of a concept of "enterprise liability" in EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

139. *Ryan v. N.Y. Cent. R.*, 35 N.Y. 210 (1866) is the classic case. The rule was departed from in *O'Neill v. N. Y. O. & W. R. R.*, 115 N.Y. 579, 22 N.E. 217 (1889), but restored emphatically in *Hoffman v. King*, 160 N.Y. 618, 55 N.E. 401 (1899). Even

sylvania,<sup>140</sup> limit liability for the spread of a fire to harm done to property on the first premises to which the fire has spread (*i.e.*, premises adjacent to the defendant's, wherein the fire started, except where the fire has leapt an intervening roadway or a vacant lot, nothing on which was ignited).<sup>141</sup> This rule has been quite properly rejected in every other jurisdiction.<sup>142</sup>

II. Going to the other extreme, so far as predictability is concerned, Edgerton has proposed that an "average sense of justice" be the yardstick and that a "justly attachable cause" be deemed a proximate cause.<sup>143</sup> A just decision is one which is "socially advantageous"—which balances "competing individual and social interests," favoring those which are most important.<sup>144</sup> Each decision serves the double function of achieving a just balance of interests in the particular case and where liability is imposed, of discouraging unsocial conduct of a similar nature in the future.<sup>145</sup> In each of its functions this test is open to criticism. Insofar as it is intended to have a deterrent effect it is, like all other tests similarly purposed, based on a misconception, for most torts are unintentional or are committed in disregard or ignorance of legal consequences.<sup>146</sup> The test is hardly more helpful in reaching decisions in individual cases. A sense of justice is of course essential in any decision-making process, for liability should never be imposed unfairly. But in most cases there is serious dispute as to the justice of any given result. In such cases it may be

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Cardozo gave support to this rule. See *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 120 N.E. 86, 13 A.L.R. 875 (1918). The rule does not, however, limit the recovery by a single owner to damages for the first structure ignited on his land. *Davies v. Delaware, L. & W. Ry.*, 215 N.Y. 181, 109 N.E. 95 (1915).

140. *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431 (1870), repudiated in *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100 (1876).

141. See *House Corp. v. Sun Oil Co.*, 258 N.Y. 462, 180 N.E. 172 (1932).

142. *Smith v. London & S. W. Ry.*, L.R. 6 C.P. 14 (1870); *Kuhn v. Jewett*, 32 N.J. Eq. 647 (1880); *Phillips v. Durham & C.R.*, 138 N.C. 12, 50 S.E. 462 (1905); *Silver Falls Timber Co. v. Eastern & W. Lumber Co.*, 149 Ore. 126, 40 P. 2d 703 (1935).

In New York the harshness of the arbitrary rule has led to modifying legislation. For example, see the sections of the state Conservation Law extending liability in cases of "forest fires" damaging "forest land," discussed in *Nicoll v. L. I. R. R.*, 232 App. Div. 435, 250 N. Y. Supp. 366 (2d Dep't 1931).

All of the foregoing were fire cases, but an arbitrary distinction based on time or space would have no greater justification in any other class of cases, "the defendant who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result and should obviously bear the consequences." PROSSER, *TORTS* 349 (1941), citing cases. Even the New York rule has not been adopted in that state except in fire cases.

143. Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 210, 343 (1924).

144. *Id.* at 373.

145. *Id.* at 347, 355, 356, 361, 367.

146. The case would be rare indeed where a possible tort-feasor would even know about the intricacies of proximate cause. And if he did, it would be speculative how much of a part in accident prevention is played by the possibility of civil liability. See James, *Accidental Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 558 (1948).

helpful to have this underlying consideration articulated, but it should not be expected that a mere statement of the goal will assure its attainment.<sup>147</sup> Justice, as a goal, is too abstract to be self-applying and self-evident in particular cases. The process of adapting and translating the abstract goal to particular situations may take one of two forms. On one hand, all hope may be abandoned of categorizing or systematizing human experience. Edgerton appears to prefer this solution for he would shun fixed rules and formulae and would instead permit the jury to consider any circumstances thought to be pertinent to impose liability upon "justly attachable" causes on grounds of fairness and social advantage.<sup>148</sup> On the other hand, the quest may be pursued for more or less definite rules, adapted from decisions in fairly discernable groups of cases with similar fact situations.<sup>149</sup> An advantage of the latter treatment is to be found in the greater predictability of decision it affords.<sup>150</sup>

III. Though it may be undesirable to entrust the jury with almost complete discretion in imposing liability, a single rule or formula which attempts to reduce all the cases to a simple pattern may not be any more desirable. For example, the division of antecedent forces into *conditions* (which merely made possible the harm, and for which there is no liability) and *causes* (upon which liability will be imposed)<sup>151</sup> is of deceptive simplicity and certainty. It may be convenient for a commentator to be able to group those cases in which no liability was imposed under the heading of "condition," and to say that the courts have found the defendant's conduct to be a "cause" in all cases in which

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147. Edgerton's fear is that the ultimate goal, justice, is being lost sight of in the maze of rigid rules of causation. His effort to restore proper perspective makes justice the only standard by which to judge. His test is thus little better than a question with regard to its ability to assure an answer, for it forecloses from all consideration the use of established intermediate reasoning aids and standards.

148. 72 U. OF PA. L. REV. at 373. This course may be characterized as little more than judicial coin-flipping. For a criticism of this improper delegation of functions to an unfit body, see McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 194 et. seq. (1924).

149. It may well be argued that the likelihood of achieving more than haphazard justice is far greater under this latter process. All of the precedent relied upon itself reflects, at least in part, a desire to deal justly with litigants, and as each rule is applied, if injustice results in any distinguishable group of situations, a modification of the rule may be expected.

On the other hand, of course, the persistence of some rules is more a matter of inertia and professional conservatism than a proof that the rule has met the pragmatic test.

This is but an aspect of an age-old controversy. Contrast for example the boast of Equity that it furnished needed flexibility with the reproach that the measure of equity was the variable measure of the Chancellor's foot.

150. Of course rules cannot afford a high degree of certainty—especially those couched in such vague terms as foreseeability. Yet even such rules give more of a guide for prophesy than Edgerton's negation of all subsidiary rules.

151. *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402 (1880); *Guilfoile v. Smith*, 95 Conn. 442, 111 Atl. 593 (1920); *Kryger v. Panaszky*, 123 Conn. 353, 196 Atl. 795 (1937), discussed in Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B. J. 24, 33 (1950).

that defendant was held liable. But as an aid in *reaching* decisions in particular cases the dichotomy is worse than useless.<sup>152</sup> It can only be related to actual fact situations if all active forces are denominated "causes" and all passive situations attributable to the defendant are classed as "conditions." But even if a valid, definitive distinction between active and passive antecedents could be made in every case,<sup>153</sup> it would often not indicate the proper decision of the proximate cause question.<sup>154</sup> The distinction between cause and condition is only determinative in a concrete case when modified by exceptions in terms of the class of risks to be anticipated or the foreseeability of intervention of an injuring force—and since, as we have seen, such "exceptions" in themselves constitute an adequate test it would seem far better to omit altogether any dependence upon the "cause-condition" formula. Most jurisdictions do not even mention it, and many others expressly repudiate it.<sup>155</sup>

IV. Considerably wider acceptance has been achieved by a formula which differentiates the "direct" from the "indirect" consequences of an act. Liability is imposed for all consequences which follow, without the intervention of new

152. "[T]he alleged distinction does not solve the question of the existence of causal relation. It is simply a restatement of the original problem in a different form of words." Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 110 (1914). Cf. 1 JAGGARD, *TORTS* 64 (1895), quoted by Smith: "The distinction between cause and condition would be valuable if there were any definite standard for determining what is a cause and what is a condition. The only standard by which this can be determined is the same as that which determines a proximate from a remote cause. . . . Accordingly, 'condition' . . . while affording a convenient verbal distinction, is, in use, likely to mislead thinkers into a conviction that they have something which they have not."

153. Cf. McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949).

154. Defendants are frequently held liable for having created a situation which had become a passive condition long before the accident. See, e.g., *Pyke v. Jamestown*, 15 N.D. 157, 107 N.W. 359 (1906) (plaintiff fell into hole in sidewalk which defendant city was negligent in digging or not repairing); *Page v. Bucksport*, 64 Me. 51 (1874) (defendant town, negligent in allowing bridge to become defective, is liable to man injured while trying to extricate horse which broke through bridge); *Teasdale v. Beacon Oil Co.*, 266 Mass. 25, 164 N.E. 612 (1929) (plaintiff burned when gasoline spilled on and around car by defendant's employee was accidentally ignited by a third person); *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933) (barge owner permitted gases to remain in barge and explosion caused by lightning followed); *Quaker Oats Co. v. Grice*, 195 Fed. 441 (2d Cir. 1912) (owner of grinding mill permitted it to become filled with dust which was exploded).

155. See, e.g., *Kinderavitch v. Palmer*, 127 Conn. 85, 95, 15 A.2d 83 (1940) ("Properly understood, to say that conduct is a condition rather than a cause of an accident means no more than that it is a remote and not a proximate cause."). But a handful of state courts still pays lip service to the useless rubric. See *Briske v. Burnham*, 379 Ill. 193, 39 N.E. 2d 976, 979 (1942); *Stewart v. Kroger Grocery*, 198 Miss. 371, 21 So. 2d 912, 914 (1945); *Oklahoma Gas & Elec. Co. v. Butler*, 190 Okla. 393, 124 P.2d 397, 399 (1942); *Atchison v. Texas & P. Ry.*, 143 Tex. 466, 186 S.W. 2d 228, 232 (1945) and even an occasional periodical treats the test as though it were a matter of some substance. See Note, 21 B.U.L. Rev. 190, 191 (1941).



external forces, in unbroken natural sequence from the original act.<sup>156</sup> At first glance this test presents merely a problem of semantics, for its most essential ingredient is an acceptable definition of a "new, external, intervening force."<sup>157</sup> But though sufficiently generalized definitions are frequently proposed the test does not become a workable one unless the court or jury is willing to refuse to go beyond a certain point in looking for new active forces.<sup>158</sup> Therefore, until such time as a court indicates the preciseness and thoroughness with which it intends to search for such forces this test must produce a high degree of uncertainty of decisions.

Even the most enthusiastic adherents to the direct-indirect test would not press it to its logically symmetrical extreme by excusing from liability *all* defendants whose acts only indirectly caused the plaintiff's injuries.<sup>159</sup> But what they fail to realize<sup>160</sup> is that not even all direct causes are "proximate," for there may be no liability even for the direct consequences of an act if the defendant was not under a duty to protect the plaintiff from the type of hazard encountered.<sup>161</sup>

156. See *Christianson v. Chicago, etc., R. Co.*, 67 Minn. 94, 69 N.W. 640, 641 (1890); *Slater v. Baker*, 261 Mass. 424, 158 N.E. 778 (1927); *Wright v. Powers*, 238 Ky. 572, 38 S.W. 2d 465, 466 (1931); *Tampa Elec. Co. v. Jones*, 138 Fla. 746, 190 So. 26, 27 (1939); *Anderson v. Johnson*, 208 Minn. 373, 294 N.W. 224, 227 (1940); and cases in 5th DECENNIAL DIGEST, Negligence § 56 (1.6 and 1.7).

For discussions which more or less support this test see Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. III, 471, 473-75 (1932) and *Proximate Cause, Part V*, 15 So. CALIF. L. REV. 304, 318, 321 (1942), discussed in note 130 *supra*.

The distinction between direct and indirect causes may be the illegitimate offspring of the obsolete distinction between trespass and case. However, at common law recovery was allowed for indirect as well as direct consequences provided the plaintiff properly labelled and pleaded his cause of action.

157. See note 115 *supra*.

158. "The entire assumption that the physiological disturbances which follow from a wound are part of the defendant's direct force rests upon a refusal to analyze the physiological processes. It is necessary to note here that obvious intervening forces, such as a man's eating, may often be neglected for practical purposes in analyzing a case. Eating bacteria is so foreseeable that it would not be an isolating force, and so the question of classification as direct causation or some other type may be ignored. It must be obvious, however, that the limits of direct causation are not sharply defined." McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 165 (1925).

159. Generally the foreseeability test is invoked. See, e.g., Carpenter, *Proximate Cause V*, 15 So. CALIF. L. REV. 304, 321 (1942).

160. Or, prefer to ignore (see last paragraph of note 130 *supra*). Cf. PROSSER, TORTS 348 (1941), which notes the arbitrariness of the distinction but finds it justifiable on grounds of practicality.

161. The classic example is Mrs. Palsgraf's case wherein the causal relation was just as direct as in the *Polemis* case. See also Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 621, 640 (1950). Moreover where a speeding car hits a child which darts into its path, defendant's wrong is surely in a sense a *direct* cause of the mishap. And if it be objected that in another sense this is not so, we are driven to ex-

In the light of the obstacles in the way of making this test more definitive and predictable, the inaccurate decisions which would result from attempts to apply it in its full import in either direction, and the problems of language arising from the use of "directness" as the touchstone of liability,<sup>162</sup> perhaps it would be better to consign the direct-indirect test to the scrap heap.

V. Another restrictive test, emphasizing chiefly the chronology of intervening human acts, holds only the *last wrongdoer* liable for an injury produced by the combined effect of successive acts of wrongdoing.<sup>163</sup> This rule may have stemmed in part from a notion (which once had some currency)<sup>164</sup> that the law fulfilled its function if it offered *one* legally liable defendant to a plaintiff, so that it was superfluous and in some peculiar way uneconomical to offer more. The rule may also be traceable to the reluctance of courts to admit that subsequent unlawful action may be expectable or that earlier wrongdoers should be responsible for such action.<sup>165</sup> At any rate, whatever the reason, the last

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aming the risks which make speeding negligent in order to draw the line between the two senses. Cf. text at note 104 *supra*. See also RESTATEMENT, TORTS § 430, comment b (1934).

Seavey concludes: "[I]f directness is meant to connote the comparative absence of external forces not set in motion by the defendant, it is not responsive to the decisions either as a test of inclusion or exclusion." Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 YALE L.J. 390, 407 (1939).

162. The semantic problem was given fuller treatment by Bauer, *Confusion of the Terms "Proximate" & "Direct"*, 11 NOTRE DAME LAW. 395 (1936). See also PROSSER, TORTS 347, n.88 (1941).

163. WHARTON, NEGLIGENCE § 134 (1st ed. 1874); Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. OF PA. L. REV. 121, 124 (1937). See also *In re Michigan S. S. Co.*, 133 Fed. 577, 579 (N.D. Calif. 1904) ("negligence 'cannot ordinarily be said to be the proximate cause of an injury when the negligence of another independent human agency has intervened and directly inflicted injury.'" citing 16 AM. & ENG. ENCY. 446 (1st ed.)).

164. Bohlen mentions this as a source of the rule: *Contributory Negligence*, 21 HARV. L. REV. 232, 238 (1908). See also the comment by Blackstone quoted by WHARTON, NEGLIGENCE § 139 (1st ed. 1874): "Three actions for a single act, . . . nay, it may be extended *ad infinitum*."

165. WHARTON, NEGLIGENCE § 138 (1st ed. 1874); *Chancey v. Norfolk & W. Ry. Co.*, 174 N.C. 351, 93 S.E. 834 (1917) (assault and robbery in overcrowded, unlit railroad car); *Andrews v. Kinsel*, 114 Ga. 390, 40 S.E. 300 (1901) (robbery by unidentified person who gained entry through window and partition negligently left open by defendant).

Holmes strongly urged the unforeseeability of subsequent unlawful acts as the true ground of many, diverse types of tort decisions. See HOLMES-POLLOCK LETTERS 34-39 (Howe ed. 1941) and discussion in text and notes 167, 172 *infra*.

Nowadays this unrealistic position is almost universally discredited. Cf., however *Daigrenpont v. Teche Greyhound Lines*, 189 Ga. 601, 7 S.E.2d 174, 178 (1940) and *Singleton Abbey v. Paludina* [1927] A.C. 16, 76 U. OF PA. L. REV. 720 (1928). As a general proposition subsequent negligent illegal or criminal actions may often be foreseeable, the only remaining issue being whether they were foreseeable in the instant case. See text and cases at note 122 *supra*.

wrongdoer rule has been used infrequently and capriciously to limit liability throughout the history of negligence law.

The sporadic instances of such use have probably been confined to a few situations where the law, for reasons of real or supposed policy, has disfavored a type of claim or defense which it nevertheless allows.<sup>166</sup> Thus recovery has been denied in a suit against a municipality for a highway defect if the accident was also contributed to by the wrongful act of a third person.<sup>167</sup> This limitation has found favor in the same class of cases in Pennsylvania also.<sup>168</sup> In nearly all states the doctrine of last clear chance, a variant of the last wrongdoer rule, is employed as a limitation on the disfavored defense of plaintiff's contributory negligence.<sup>169</sup> Occasionally, the defense of contributory negligence itself has been called merely an application of the last wrongdoer rule.<sup>170</sup> And a harsh, indefensible doctrine has recently been fashioned by a few courts to exonerate an illegally parked vehicle from liability, even to innocent victims, wherever the moving driver saw the parked vehicle in time to avoid hitting it.<sup>171</sup> The

166. See note 87 *supra*, listing some of the so-called "favored" enterprises and disfavored actions and defenses.

167. *Hayes v. Hyde Park*, 153 Mass. 514, 27 N.E. 522, 12 L.R.A. 249 (1891) (opinion by Holmes); *Mahogany v. Ward*, 16 R.I. 479, 17 Atl. 860 (1889). The liability of a municipality in this situation springs solely from statute and courts tend to construe these statutes with an especially tender regard for the defendants. For example, a few courts have required that the street defect be the "sole" cause of the injury. See *Bartram v. Town of Sharon*, 71 Conn. 686, 43 Atl. 143, 46 L.R.A. 144, 71 Am. St. Rep. 225 (1899). Holmes did not feel it was necessary to resort to a rule of strict construction to exonerate the town, however; in the *Hayes* case, *supra*, the decision rests upon the last wrongdoer rule as a general principle. (See 153 Mass. at 515-16; HOLMES-POLLOCK LETTERS 38 (Howe ed. 1941)). Cf. also *Milostan v. City of Chicago*, 148 Ill. App. 540 (1909) (wilful act of third party cannot combine with mere negligent omission as proximate cause).

168. *Stone v. Philadelphia*, 302 Pa. 340, 153 Atl. 550 (1930); *Hoffman v. McKeesport*, 303 Pa. 348, 154 Atl. 925 (1931). Cf. *Maguire v. Doughty*, 326 Pa. 122, 127, 191 Atl. 348 (1937) (last wrongdoer rule applied to exonerate traction company). Eldredge has documented the aberrational nature of these decisions even as regards Pennsylvania precedent in *Culpable Intervention as Superseding Cause*, 86 U. OF PA. L. REV. 121 (1937).

Some cases which have been put on this ground would probably be decided as they were on any ground. *Alexander v. New Castle*, 115 Ind. 51, 17 S.E. 200 (1888) (plaintiff injured when third person deliberately threw him into excavation negligently left unguarded by city. This was scarcely the type of risk that makes a highway defect negligent).

169. James, *Last Clear Chance, A Transitional Doctrine*, 47 YALE L.J. 704 (1938). Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 238 (1908), was probably the first to characterize this doctrine as an application of the last wrongdoer rule.

170. Although such an explanation would by no means account for many of the situations in which the doctrine is daily applied. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908); James, *Last Clear Chance, A Transitional Doctrine*, 47 YALE L.J. 704, nn. 2-4 (1938).

171. Of course if the *only* negligence of the parked vehicle is the failure to set out proper signals, that failure is not a cause in fact of being hit by a driver who saw the obstruction anyway. *Jilka v. National Mut. Cas. Co.*, 152 Kan. 537, 106 P.2d 665

principle has also been used outside of the field of negligence as, *e.g.*, to limit liability of defendants in disfavored actions for defamation.<sup>172</sup>

The last wrongdoer rule is subject to criticism wherever it is invoked. It reflects no vital modern policy, but only earlier mechanistic notions.<sup>173</sup> And it is irreconcilable with large bodies of existing case law. The last wrongdoer is not always held liable for damage which ensues;<sup>174</sup> on the other hand a wrongdoer who is not closest in point of time to the plaintiff's injury is often held liable.<sup>175</sup> At best the last wrongdoer test yields a "correct" result only by chance.

VI. Jeremiah Smith suggested that liability be limited to those cases in which the defendant's tort was "a substantial factor in producing the damage complained of."<sup>176</sup> This "test" for limiting liability attracted no following in the courts, and only scant attention from commentators, until the Restatement of Torts adopted it in 1934.<sup>177</sup> Since that time its popularity has greatly increased and today more than a dozen states at least pay lip service to it.<sup>178</sup>

(1940). But if the vehicle is standing on a part of the highway where it is forbidden to park, the purpose of the prohibition is surely in part to cut down the chance of being hit by confused and stupid drivers, as well as by inattentive ones. Yet a few courts have evoked the last wrongdoer rule from the shades of the past to insulate the parked vehicle's operator or owner from liability wherever the overtaking driver saw the obstruction when he still could have stopped. *Medred v. Doolittle*, 220 Minn. 352, 19 N.W.2d 788 (1945); *Kline v. Mayer*, 325 Pa. 357, 191 Atl. 43 (1937) (perhaps no different from the *Jilka* case, *supra*, but uses broader language). Some courts have even used this kind of reasoning where the overtaking driver negligently failed to see the obstruction. *Hubbard v. Murray*, 173 Va. 448, 3 S.E.2d 397 (1939); *Hataway v. F. Strauss & Son*, 158 So. 408 (La. App. 1935); *cf. Jagers v. Southeastern G. L. Co.* 34 F. Supp. 667 (M.D. Tenn. 1940). Cases where the accident would have happened anyway even if defendant's car had been left so as to leave the legal clearance are, of course, distinguishable. *Schultz v. Brogan*, 251 Wis. 390, 29 N.W.2d 719 (1947); *Walton v. Blauert*, 256 Wis. 125, 40 N.W.2d 545 (1949).

The weight of authority, however, quite properly allows the innocent victim to hold both the one who parked the stationary vehicle and the driver who negligently ran into him. *Kieper v. Pacific G. & E. Co.*, 36 Cal. App. 362, 172 Pac. 180 (1918); cases collected in Notes, 111 A.L.R. 412 (1937); 131 A.L.R. 562, 605 (1941).

172. "The general rule, that a man is not liable for a third person's actionable and unauthorized repetition of his slander, is settled." Holmes, J., in *Elmer v. Fessenden*, 151 Mass. 359, 362, 24 N.E. 208, 209 (1889). *Cf. Vicar v. Wilcocks*, 8 East 1 (1806) (plaintiff could not recover damages from his slanderer for his wrongful discharge by his employer in consequence of the slander).

173. See Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 231, 236 (1908); 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 460 (2d ed. 1931). Even in last clear chance cases the formula in no way expresses a vital modern policy though it has been a vehicle for such a policy. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

174. He will be so held only where he is under a duty with respect to the risk actually encountered. See text at note 99 *supra*.

175. HARPER, LAW OF TORTS §§ 123, 214 (1931); PROSSER, TORTS 357 (1941). See notes 121-124 *supra*.

176. Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 303, 309 (1912).

177. RESTATEMENT, TORTS §§ 431, 433, 435 (1934) and text, *infra*, at notes 179 *et seq.*

178. And in some jurisdictions "substantial factor" has become the only acceptable formula. See cases cited in note 192 *infra*.

The distinction between substantial factors and others may perhaps be significant and useful in practically fixing the limits of the cause-in-fact relation between defendant's wrong and plaintiff's damage.<sup>179</sup> But as Smith and originally the Restatement presented the test, it appeared to go further than this and to be, in effect, a test of *proximate* cause. Thus the Restatement provides that negligence is a legal cause of harm if it is a substantial factor in bringing that harm about, and if there is no rule of law which relieves the actor from liability because of the way the harm was brought about.<sup>180</sup> The next section, 432, declares in effect that conduct cannot be a substantial factor in producing harm *unless* it is a cause in fact of the harm. Then Section 433 proceeds to list factors which may be important in determining whether negligence is a substantial factor in causing harm, and among these factors was originally put the curious foreseeability-of-hindsight test discussed above.<sup>181</sup> But as we have seen<sup>182</sup> foreseeability has no place at all in solving the cause in fact problem. Rather it represents a limitation which would relieve a defendant, for reasons of policy, from liability for harm which he in fact caused. The Institute has recognized this and in 1948, Section 433 was amended to delete the foreseeability-of-hindsight clause.<sup>183</sup> The amendment is wise.<sup>184</sup> "Sub-

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179. Yet if the limitations on scope of duty be observed (*viz.*, that the harm must come to the class of interests foreseeably jeopardized, from a risk the likelihood of which made defendant's conduct negligent) it may be hard to imagine a negligent act which is at the same time a necessary antecedent of the harm and yet *not* a substantial factor in producing it. See Carpenter, *Proximate Cause*, 14 So. CALIF. L. REV. 416, 431-4 (1941). Perhaps the substantial factor formula may be helpful in deciding whether defendant's wrong effectively contributed to plaintiff's harm where another cause would have brought about that harm anyway. See page 774 *supra*; RESTATEMENT, TORTS § 432 (2) (1934).

180. RESTATEMENT, TORTS, § 431 (1934).

181. At notes 135, 136 *supra*. The test in question was phrased thus: "whether after the event and looking back from the harm to the actor's negligent conduct it appeared highly extraordinary that it should have brought about the harm."

182. At page 787 *supra*.

183. RESTATEMENT, TORTS 733 (Supp. 1948). As the new added comment makes clear, the substantial factor formula is applicable only to the cause in fact question. "It is completely faulty analysis" and "is confusing the question of policy with the question of fact," to use the criterion of foreseeability (the "highly extraordinary" formula) in determining such a question. The formula is not abandoned in the Supplement, but is transferred to § 435 where it is presented as a rule of policy which relieves the actor from liability for harm which he has, in fact, caused.

Perhaps it was always the intent of the Institute that "substantial factor" be a test only of cause in fact, and some courts have so understood it. *Goudy v. State*, 35 So. 308 (Miss. 1948); *Schultz v. Brogan*, 251 Wis. 390, 29 N.W.2d 719 (1947). But other courts have assimilated the phrase to all the hopeless confusion that can surround the notion of "proximate cause." *E.g.*, *Hayes Freight Lines v. Wilson*, 226 Ind. 1, 77 N.E.2d 580 (1948).

184. Though it does not go far enough. Surely clarity of thought would have been aided greatly had the Institute had the courage of the conviction which it now expresses

stantial factor" as a test of *proximate* cause is no more helpful than proximate cause itself. If defendant's wrong is a substantial cause in fact of plaintiff's harm, recovery should not be denied because of any further consideration of cause. To be sure recovery may be prevented by other kinds of considerations such as limitations on the scope of duty. But the term "substantial factor" is no more appropriate to describe these considerations than is any of the other cause formulas treated above.<sup>185</sup>

VII. Language in vogue in different states. Virtually every one of the tests discussed above has had some currency among the courts of the different states, both in charges to the jury and in judicial opinions. And many states may be said to "adopt" one "rule" at one time, and another "rule" at another time. The fact is that in a great number of situations it makes very little difference what test is used.<sup>186</sup> In many cases, for example, there is no question of intervening cause and the very popular direct cause formula<sup>187</sup> is appropriate enough. Where, however, there is an intervening cause or the like, an instruction in terms of direct cause may be erroneous,<sup>188</sup> unless it is coupled with an adequate guide for telling when there may still be liability despite such interventions.<sup>189</sup> Reference to such a work as *Words and Phrases*<sup>190</sup> will show that the most generally used expressions today are those involving some form of the directness test; those associated with foreseeability (natural and probable consequences,<sup>191</sup> and the like); and the "substantial factor" test.<sup>192</sup> The "justly attachable cause" formula has had little

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(see new comment to § 281 on p. 651 of the 1948 Supplement) that "a completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in [the Negligence] chapter." Indeed all of the chapter on cause (except for the cause in fact provision) should have been deleted. Cf. Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 602 *et seq.* (1935).

185. *Id.*, n. 184.

186. And in such situations it is obvious, from even cursory reading of the cases, that many courts indulge in random, standard definitions of proximate cause merely as a "warm-up" exercise; formulas are collected indiscriminately and then often accorded no further consideration (by relating them to the merits of the case, and the like). See, e.g., *Berg v. New York C. R. Co.*, 391 Ill. 52, 62 N.E.2d 676 (1945); *Greiving v. La Plante*, 156 Kan. 196, 131 P.2d 898 (1943).

187. A typical statement of this formula may be found in *Blanton v. Curry*, 20 Cal.2d 793, 805, 129 P.2d 1, 8 (1942) ("[T]hat cause which in natural and continuous sequences, unbroken by any efficient intervening cause, produced the injuries, and without which the results would not have occurred." The last clause, of course, states the but-for test).

188. See, e.g., *Conor v. Flick*, 64 Ohio App. 259, 28 N.E.2d 657 (1940). Contrast *Wheeler v. Milner*, 137 Wis. 26, 118 N.W. 187 (1908), where the court recognizes the theoretical inadequacy of the directness test but holds a charge embodying it harmless error where there was no intervening cause.

189. As in *State v. Columbus Hall Ass.*, 75 N.D. 275, 27 N.W.2d 664 (1947).

190. 34 WORDS & PHRASES 717 *et seq.* (Perm. Ed. 1940), and current supplements.

191. See also DECENNIAL DIGESTS, NEGLIGENCE 58, 59.

192. WORDS & PHRASES does not do justice to the "substantial factor" test. Perhaps the strongest adherent to this test is Connecticut. *Mahoney v. Beatman*, 110 Conn.

or no following. We have indicated above the extent of the limited acceptance of the last wrongdoer<sup>193</sup> rule, the cause-condition formula,<sup>194</sup> and the limitation in terms of time and space gaps.<sup>195</sup> So far as the more generally recognized tests go, it will be clear from what has been said that it is fruitless to classify states as having adopted one or the other. A few jurisdictions purport to reject specifically certain tests and to be satisfied only with certain others.<sup>196</sup> But this sort of thing is largely a battle of words. What is needed is a separation between the issue of cause and all the other issues, which are often meritorious in themselves but too frequently parade meretriciously in the guise of cause. Perhaps this would affect substantive results only a little, but it would contribute much to clarity of thought.

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184, 147 Atl. 762 (1929); *Kinderavitch v. Palmer*, 127 Conn. 85, 15 A.2d 83 (1941). Since it was adopted in the RESTATEMENT, a number of other states have accepted it. *Herzberg v. White*, 49 Ariz. 313, 66 P.2d 253 (1937); *New Orleans & N.E.R. Co. v. Burges*, 191 Miss. 303, 2 So.2d 825 (1941); *Giles v. Moundridge M. Co.*, 351 Mo. 568, 173 S.W.2d 745 (1943); *Klein v. Herlim Realty Co.*, 184 Misc. 852, 54 N.Y.S.2d 144, *aff'd*, 269 App. Div. 934, 58 N.Y.S.2d 344 (1st Dep't 1945); *Simon v. Hudson Coal Co.*, 350 Pa. 82, 38 A.2d 259 (1944); *Weaver v. McClintock-Trunkey Co.*, 8 Wash.2d 154, 111 P.2d 570 (1941); *Hatch v. Smail*, 249 Wis. 183, 23 N.W.2d 460 (1946).

193. See pages 806-8 *supra*.

194. See pages 803-4 *supra*.

195. See pages 801-2 *supra*.

196. Minnesota, for example, has rejected the "substantial factor" test. *Seward v. Minneapolis Street Ry.*, 222 Minn. 454, 25 N.W.2d 221, 224 (1946) ("Proximate cause is not adequately defined by merely telling a jury that a 'material element or substantial factor' in causation is a proximate cause. . . . [It] leaves the jury afloat without a rudder."). *But cf.* *Anderson v. Johnson*, 208 Minn. 373, 294 N.W. 224 (1940). Wisconsin, which for many years espoused the "natural and probable consequence" test, has recently indicated limited approval of the "substantial factor" test (see note 192 *supra*), but many years ago specifically rejected the "direct-indirect" test. See *Mauch v. Hartford*, 112 Wis. 40, 58, 87 N.W. 816, 823 (1901); *Wheeler v. Milner*, 137 Wis. 26, 28, 118 N.W. 187, 188 (1908); *Meyer v. Milwaukee*, 116 Wis. 336, 339, 93 N.W. 6 (1903); and Connecticut's wholehearted adoption of the "substantial factor" test has on one occasion resulted in an unnecessary rejection of the foreseeability test. *Corey v. Phillips*, 126 Conn. 246, 255, 10 A.2d 370 (1939).

It is not suggested, of course, that such a specific rejection will be a conclusive and inflexible proscription in a jurisdiction for all cases and for all time. And use of a proscribed formula in any given case may be harmless error, as in *Wheeler v. Milner*, *supra*.